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pril 3, 1984

Title: Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc., Petitioners
v.
Nation Enterprises and The Nation Associates, Inc.

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Miller, Edward A.

Counsel for respondent: Abrams, Floyd

ntry	Date	Note	Proceedings and Orders
1	Apr 3 1984	G	Petition for writ of certiorari filed.
2	May 8 1984		Brief of respondent Nation Enterprises, et al. in opposition filed.
3	May 8 1984		DISTRIBUTED. May 24, 1984
4	May 29 1984		Petition GRANTED.
			**********
6	Jun 19 1984		Order extending time to file brief of petitioner on the merits until July 20, 1984.
7	Jul 19 1984		Brief amicus curiae of Assn. of American Publishers, Inc. filed.
8	Jul 20 1984		Brief amicus curiae of Volunteer Lawyers for the Arts, Inc. filed.
9	Jul 20 1984		Joint appendix filed.
10	Jul 20 1984		Brief of petitioners Harper & Row, et al. filed.
11	Aug 3 1984		Record filed.
12	Aug 20 1984		Brief amicus curiae of Pen American Center filed.
13	Aug 20 1984		Brief amicus curiae of Gannet Company, Inc., et al. filed.
14	Aug 20 1984		Brief of respondents Nation Enterprises, et al. filed.
15	Aug 21 1984		CIRCULATED.
16	Aug 28 1984		SET FOR ARGUMENT. Tuesday, November 6, 1984. (4th case)
17	Oct 26 1984	X	Reply brief of petitioners Harper & Row, et al. filed.
18	Nov 6 1984		ARGUED.

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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

VS.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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187 pp

QUESTIONS PRESENTED

1. Does the First Amendment require that the scope of copyright protection for a work of non-fiction be narrowed?

2. Does the First Amendment prevail over Copyright in a fair use case, where the copyrighted material allegedly published in the name of harvesting knowledge was in fact soon to be published by the copyright owner?

3. Should the court, in a fair use case, give weight to the facts that the use was non-productive and the material taken was from an unpublished manuscript?

THE PARTIES

The parties before this Court are those set forth in the caption.*

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* Pursuant to Ru'e 28.1 of the Rules of the Supreme Court: Petitioner Harper & Row, Publishers, Inc. states that it has no corporate parent and that other than Fitzhenry & Whiteside Ltd., a Canadian corporation, it has no subsidiaries or affiliates (other than wholly-owned subsidiaries). Petitioner The Reader's Digest Association, Inc. states that it has no corporate parent and no publicly-owned subsidiaries or affiliates.

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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

vs.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

Petitioners Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 17, 1983.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 723 F.2d 195 (2d Cir. 1983), and are annexed hereto as Appendix A. The district court opinion is reported at 557 F. Supp. 1067 (S.D.N.Y. 1983) and is annexed hereto as Appendix B. The District Court's Supplemental Findings of Fact and Conclusion of Law, not reported, are annexed hereto as Appendix C.

JURISDICTION

The opinion and order of the Court of Appeals was entered on November 17, 1983. A timely petition for rehearing and rehearing *en banc* was denied on January 4, 1984, and this petition for certiorari was filed within 90 days of that date. The order denying rehearing is annexed hereto as Appendix D.

This Court's jurisdiction is invoked under 28 U.S.C. § 2101(c) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I Sec. 8 of the Constitution provides that:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The First Amendment to the Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 107 of the Copyright Revision Act of 1976, 17 U.S.C. § 107 (1976), provides that:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not

> an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Petitioners Harper & Row, Publishers, Inc. ("Harper & Row") and The Reader's Digest Association, Inc. ("Reader's Digest") are the owners of the publication rights to "A Time to Heal," the memoirs of former President Gerald R. Ford. Shortly before publication of this book, Respondents, Nation Enterprises and The Nation Associates, Inc. ("the *Nation*") received a copy of the manuscript from a clandestine source. Quickly copying from the unpublished work, and without adding independent commentary, the *Nation* published in their weekly magazine an article entitled "The Ford Memoirs-Behind the Nixon Pardon." The *Nation* had ascertained the memoirs' book publishing schedule, and knew their article would be appearing just two weeks before *Time* was to print licensed excerpts. Petitioners brought suit in Federal district court for copyright infringement under the Copyright Act of 1976, 17 U.S.C. §101 *et. seq.* and 28 U.S.C. §1338(a).

After a bench trial, the district court held that the *Nation* article quoted and paraphrased Mr. Ford's copyrightable expression, and that the fair use doctrine did not exonerate defendants' copying.

The Court of Appeals for the Second Circuit reversed in a 2-1 decision. The majority (Kaufman, J.) held that most of the material quoted and paraphrased by the *Nation* was not protectible under the copyright laws and that the balance of the copying was permissible under the fair use doctrine.

STATEMENT OF FACTS

The Ford Manuscript

On February 28, 1977 former President Ford entered into a publishing contract with plaintiffs, granting them the exclusive rights to publish and sell his memoirs in book form and to license the right to publish excerpts in newspapers or periodicals prior to book publication. (Findings 6-7, C 5-6)[1]

President Ford hired an experienced writer, Trevor Armbrister, to assist him in preparing his memoirs, and they worked together on them for approximately two years. Mr. Ford intended the memoirs to be as informal as possible, based upon his own recollections and without reliance on documents. Armbrister felt the memoirs should be very human and reflect the personal side of Ford's public service. (Findings 9-10, C 6-7).

Armbrister participated in over 200 2-hour taped interviews with Ford which were transcribed in 3,600 legal sized pages. Both participants spent considerable time preparing for the interviews, and Ford drafted "word portraits" of major figures and essays on various subjects. (The latter included Ford's perception of Nixon's character copied almost verbatim by the *Nation*). Armbrister also conducted 2,600 legal sized pages of

[1] The following abbreviations are used:

Findings	–	Findings of Fact and Conclusions of Law of The District Court, Reproduced in Appendix C to this Petition
PTX___	–	Plaintiffs' trial exhibit__
DTX __	–	Defendants' trial exhibit__
TR ___	–	Trial transcript at the page indicated
Dep. at__	–	Deposition transcript at the page indicated

taped interviews with numerous other people, including Alexander Haig, Nelson Rockefeller, Henry Kissinger and President Ford's aides. These were used to check and stimulate Mr. Ford's recollections and reconstruction. (Findings 10-15, C 7-10; Armbrister TR 90-91, 124-25; E 38-39).

Armbrister completed a first draft in February 1979. President Ford reviewed, edited and then revised the initial typescript. Three further, complete word-for-word editing sessions involving President Ford, Armbrister and others occurred, with the former President personally making many changes in each draft. President Ford's March 1979 changes in the galleys were so extensive that one of the editors described it as a "rewriting." (Findings 17-19, C 11-12).

The manuscript, which used the former President's own words from the Ford-Armbrister dialogues, had Mr. Ford's full and final approval of the selection and arrangement of all of its contents, as well as of the language employed. (Finding 20, C 11-12).

The Author's Agreements with Harper & Row and Reader's Digest

An exhibit to the publishing contract stated that Mr. Ford's memoirs would:

> "describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about (1) Mr. Ford's relationship with former Preident Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and (3) Mr. Ford's reflections on this period of history, and the morality and personalities involved." (Finding 21, C 14-15).

In the contract Ford also acknowledged that the value of the rights granted would be substantially diminished by his public discussion of the "unique information not previously disclosed" about his career and personal life and that he would "endeavor" not to disseminate any of such information. However, the agreement also provided: "Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision." (Finding 22, C 15-16).

Ford, as President, had testified extensively concerning the pardon before a Sub-Committee of the House Committee on the Judiciary under Representative Hungate. In this case he testified that he had already disclosed publicly while in office all of the facts about the pardon. In addition, after leaving office and while preparing his manuscript, he responded to press and audience questions about the pardon during interviews and speeches. (Findings 22-23, C 15-16; PTX 14, Ford Dep. 16-18, 59-60). There was no evidence that Mr. Ford withheld comment about the facts of his public life after leaving the Presidency.

Ford's publishers also understood that the memoirs' unique information not previously disclosed would relate to Ford's personal thoughts and feelings about the events of his Presidency, rather than the events themselves. (Finding 24, C 17).

The License to Time Magazine

On March 14, 1979 when work on the memoirs was nearing completion, the plaintiffs licensed to *Time* the exclusive right to publish (before book publication) excerpts from Chapters I and III, which *Time*'s editor described as the "most interesting and moving parts of the entire manuscript." The excerpts were to appear in *Time*'s April 23 issue to go on sale at newsstands on April 16, 1979. *Time* paid $12,500 upon signing the license and was to pay another $12,500 upon its publication of the excerpts. *Time* was allowed to renegotiate the second installment in the event there was any publication from Chapters I and III before *Time*'s. (Findings 27-29, C 18-19; PTX 40, Cave Dep. 16-17).

The Nation Article

In December 1977, a new group of investors acquired the *Nation* magazine with avowed goals of increasing circulation and advertising revenue and turning the magazine around financially. Their plan included efforts "to stay on top of the news on a week-to-week basis" and the appointment of Victor Navasky as Editor. Navasky was a Yale Law School graduate with broad experience in journalism and public affairs. (PTX 33, Navasky Dep. 3-6, 8, 10-12, 16, 18).

In late March 1979, a person, never identified, secretly gave Navasky a copy of the unpublished manuscript of the memoirs. Navasky knew that his receipt of the manuscript was unauthorized. Over the next 24 hours or weekend, the *Nation* rushed into print for its April 7, 1979 edition, a 2,250 word cover-featured piece "The Ford Memoirs-Behind the Nixon Pardon", derived almost exclusively from the memoirs, 83% (1,870 words) of which was copied or closely paraphrased from the unpublished manuscript. (Findings 33-36, C 20-22; E 1-41).

The extent of the copying has never been disputed. The nature of it can be readily seen by examining Plaintiffs' Exhibit 11, reproduced as Appendix E to this Petition, containing a side-by-side comparison of the *Nation* article and the Ford manuscript. As can be seen from a review of this exhibit, the copying included Ford's personal expression of the events and personalities of his Presidency, and of his feelings about those events and personalities.

For example, defendants quoted verbatim Ford's reflections on his reasons for pardoning Richard Nixon:

> Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon— and Watergate— behind us as quickly as possible. (E 26-27)

The *Nation* also directly copied Ford's account of his reactions to seeing Mr. Nixon in the hospital, and his views on Mr. Nixon's character:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen and I thought I had never seen anyone closer to death.
>
> • • •
>
> A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)
>
> His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. (E 28-29, 38-39).

Defendants' trial testimony further demonstrated that defendants sought to, and did, copy Ford's expression. Mr. Navasky testified that he quoted Ford's portrait of Nixon because "this was his (Ford's) own way of saying it." (Navasky, TR 456). He quoted Ford's evaluation of the reasons for granting the pardon "because of the absolute certainty with which he expressed himself." (*Id.* at 455). He quoted Ford's account of the negotiations with Ron Ziegler because "...when Ford writes about this as a narrator, it was the definitive quality of the statement that made me put it in." (*Id.* at 457). And he quoted Ford's account of Nixon's assurances of innocence because it was "a much more powerful statement for the reader." (*Id.* at 452).

The *Nation*'s piece was placed on sale by April 3, 1979 despite defendants' knowledge of plaintiffs' contract with *Time* for publication in *Time*'s issue to be on sale April 16th, and despite the *Nation*'s awareness of the scheduled availability of the full

book in bookstores from May 1, 1979. The *Nation* also knew that the published memoirs' commercial success would depend on public reaction to the *Time* excerpts, and were aware that the same portions which defendants copied would be of interest to *Time*. (*Nation* Article, E 6; Navasky TR 538; Findings 34, 67, C 21, 28-29).

At the time of publication, the *Nation* proclaimed its purpose of "scoop(ing) former President Ford on his own memoirs." (PTX 22). They intended to make a "news event" for the wire services by recounting Ford's story of the pardon as he told it, without independent commentary. (Navasky TR 452-53, 467-68, 536-38).

Navasky's notes show that he had initially intended to include a section in his article which would critically explore the issues which he perceived the memoirs raised. (PTX 19). However, he eschewed this approach, because "It looks like I didn't have time to... The story I wrote, which I did very quickly because we wanted to get it out as soon as possible, seemed to work without my going into this other stuff" (PTX 33, Navasky Dep. 60).

Due to their rush, the *Nation* also failed to check the record or realize that the pardon-related events recounted were well known, and that Ford's story was not based on government documents or information which Ford had sequestered from public view. (Findings 44-46, C 24-27; Navasky TR 484-89; Armbrister TR 29-30).

Time's Reaction

The appearance of the *Nation*'s piece caused *Time* to cancel its plans to publish excerpts and to refuse payment to plaintiffs of the $12,500 that would otherwise have been due upon *Time*'s publication. (Finding 38, C 22-23).

REASONS FOR GRANTING CERTIORARI

The majority opinion by Judge Kaufman raises important issues concerning the relationship between Copyright and the

First Amendment. In its analysis both of copyrightability and of fair use, the majority found that First Amendment considerations prevailed over copyright considerations. However, the majority's restrictions on copyrightability, which conflict with the decisions of other circuits, are not needed to advance First Amendment freedoms. And the majority's fair use decision did not strike the proper balance between the important policies of encouraging authorship and facilitating the dissemination of information. On the one hand it downplayed authorship. On the other, it sanctioned a use of copyrighted material, in the name of harvesting knowledge, even though the same material was soon to be published by the copyright owner.

The majority opinion also conflicts with this Court's recent decision in *Sony*, by giving no weight to the fact that the use was non-productive, and conflicts with the clearly expressed legislative intent in enacting the Copyright Act of 1976, by disregarding the fact that the material used was unpublished.

I

The Majority, in Conflict With the Holdings of Other Circuits, Redefined and Severely Limited the Scope of What is Protectible Under the Copyright Laws in a Work of Non-Fiction. These Holdings are Not Required to Advance First Amendment Freedoms.

In three holdings of major importance, which conflict with the rule in other circuits, the majority set down new definitions of what is protectible under the copyright laws in a work of non-fiction. Thus the majority held (a) that in works concerning news and history, the "troublesome" concept of expression must be limited to "its barest elements - the ordering and choice of the words themselves" (A 19), (b) that facts coupled with expression cannot constitute a copyrightable totality (A 21), and (c) that almost unlimited paraphrasing from a work of non-fiction is permissible, unless the copier has "borrowed virtually an entire work". (A 17).

These rulings are in conflict with the decisions of other circuits, as well as prior decision by the Second Circuit itself.

(a) Limiting Expression to its Barest Elements

Contrary to the holding below, no other circuits have held that in the context of news or history, "expression" is a "troublesome concept" which must be limited to its "barest elements." As early as 1921, the Seventh Circuit held protected the "arrangement and manner of statement" of news and facts. *Chicago Record-Herald Co. v. Tribune Ass'n.*, 275 F. 797, 799 (7th Cir. 1921). The Court there stated: "...if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law." The Seventh Circuit followed this holding in *Eisenschiml v. Fawcett Publications*, 246 F.2d 598 (7th Cir. 1957), *cert. denied*, 355 U.S. 907 (1957), there defining copyrighted expression in a historical work to include "the association, arrangement and combination of ideas and thought and their form of expression..." *Id.* at 603.

In *Miller v. Universal City Studios*, 650 F.2d 1365 (5th Cir. 1981), involving alleged copying from a work of non-fiction concerning a highly publicized kidnapping, the Fifth Circuit upheld an instruction to the jury which stated that while a general theme cannot be copyrighted, "its expression throughout the pattern of the work, the sequence of its events, the development of the interplay of its characters and its choice of detail and dialogue can by copyrighted." *Id.* at 1368. In *United States v. Hamilton*, 583 F.2d 448, 450 (9th Cir. 1978), the Ninth Circuit accorded protection to a mapmaker's "selection, arrangement and presentation" of terrain features.

Prior holdings by the Second Circuit as well have rejected the narrow definition of protectible expression now espoused by the majority. In *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), the unanimous court stated:

> It is, of course, axiomatic that "news events" may not be copyrighted. But in considering the copyright protection due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.*, the event itself, and "the particular form or collection of words in which the writer has communicated it." ***What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments.*** Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events, and characterization." In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source. *Id.* at 95-96 (citations omitted; emphasis supplied).

See also Nutt v. National Institute Inc. for the Improvement of Memory, 31 F.2d 236 (2d Cir. 1929) (court protected "association, presentation and combination of the ideas and thought" which went to make up plaintiff's lectures on memory improvement); *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir. 1962), *cert. denied*, 371 U.S. 817 (1962) (court protected plaintiff's "analysis, organization of material, phrasing and citations" in a book on real estate condemnation proceedings).[2]

[2] The majority's narrow definition of "expression" is also in conflict with district court decisions in the eighth and ninth circuits. Thus, in *Holdredge v. Knight Publishing Corporation*, 214 F. Supp. 921 (S.D. Cal. 1963), the court applied the "association, arrangement and combination of ideas and thoughts" definition to determine what was copyrightable in the plaintiff's biography of a historical figure. And in *Amana Refrigeration Inc. v. Consumers Union of the United States, Inc.*, 431 F. Supp. 316, 324 (N.D. Iowa 1977), the court rejected an argument that a consumer's union report on a particular product was not copyrightable because it was merely a "bald statement of fact without originality" finding instead that the paragraph which had been copied from the report was "more than mere statement of fact. It contains defendant's original analysis and conclusion and is copyrightable."

(b) Denying Copyrightability to Facts Coupled with Expression

The ruling that fact coupled with expression cannot constitute a copyrightable totality conflicts with the holdings of other circuits on two counts.

First, the unauthorized copying of works consisting primarily of factual material has been held to be an infringement by a number of circuits. Thus, copyright protection has been accorded to "the arrangement, expression and manner of presentation" of mathematical data and formulae concerning hydraulic cylinders, *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); to the selection, ordering and arrangement of the names and addresses of suppliers of gardening materials, *Schroeder v. William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977); to a telephone directory, *Leon v. Pacific Telephone and Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); and to the selection and arrangement of cases under particular sections of the Ohio code, *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

Second, the majority's rejection of the totality concept is in direct conflict with a line of cases in the Ninth Circuit. In *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), the Ninth Circuit held that although the textual material in a greeting card was in the public domain, this did not end the inquiry into the copyrightability of the entire card. Rather the court held the "proper analysis" of the issue required that all elements of each card, including text, arrangement of text, artwork and association between artwork and text be considered "as a whole." *Id.* at 1109.

In *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978), the Ninth Circuit adhered to the doctrine of *Roth*. There the court rejected the defendant's argument that the map which it had copied was not entitled to copyright because it was merely a synthesis of information already depicted on maps in the public domain, finding instead that "when a work displays a significant element of compilation, that element is protectible even

though the individual components of the work may not be, for originality may be found in taking the commonplace and making it into a new combination or arrangement." 583 F.2d at 451.

And in *Sid & Marty Krofft Television Productions v. MacDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) the Ninth Circuit also rejected the defendant's "invitation to dissect the works," holding that "...it is the combination of many different elements which may command copyright protection because of its particular subjective quality." *Id.* at 1169.

Even a prior decision of the Second Circuit has endorsed the "totality" concept which the majority below rejected. In *Jeweller's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1922), *cert. denied*, 259 U.S. 581 (1922) the court found that the defendant had infringed the plaintiff's copyright to its compilation of trademarks, stating "if a man compiles a book containing such information [name, occupation, place of business, residency] about the residents of a particular place, *he may... copyright it as a whole*, notwithstanding the fact that the separate parts of which it is composed are not copyrightable." *Id.* at 87 (emphasis supplied).

(c) Allowing Virtually Unlimited Paraphrasing From a Work of Non-Fiction

Finally, the holding that paraphrasing from a work of non-fiction constitutes infringement only if the copier "borrowed virtually an entire work" is in conflict with the holdings in several circuits. In *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), the Seventh Circuit found infringement where defendant had paraphrased two pages of a 32-page booklet containing mathematical data and formulae. In *Meccano v. Wagner*, 246 F.603 (6th Cir. 1916), *aff'g* 234 F. 912 (S.D. Ohio 1916), the Sixth Circuit upheld a finding of infringement based upon paraphrasing of some of the statements and descriptions in an instruction manual for mechanical toys. In *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 86-87 (6th Cir. 1928), the Sixth Circuit found infringement after

reviewing 54 instances of "paraphrasing or identities of expression" taken from the plaintiff's 11 volume work. Finally, in *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974) *aff'g* 378 F. Supp. 686 (S.D.N.Y. 1974), the Second Circuit upheld a temporary injunction based upon paraphrasing from a competing college textbook, where the amount copied was approximately 11 % of the infringing book and a smaller percentage of the book that was infringed. [3, 4]

Underlying the majority's three holdings limiting copyrightability was its perceived need to "construe the concept of copyrightability in accord with First Amendment freedoms." (A 19). The majority feared that unless it limited the scope of copyright protection in the manner outlined above, an "individual could become the owner of an important political event merely by being the first to depict that event in words" (A 19) and a public official could "take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting that the work's entire contents are thereby made his alone by virtue of copyright." (A 21)[5]

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[3] The extent of paraphrasing in the infringing book is set forth in the district court's subsequent opinion in the case, *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 413 F. Supp. 385 (S.D.N.Y. 1975). The extent of paraphrasing of the book that was infringed is based on counsel's personal knowledge of the record in that case.

[4] District courts have also held that paraphrasing of less than an entire non-fiction work or an entire chapter of a non-fiction work constitutes infringement. For example, in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), the court held that the defendant's paraphrasing of three sentences from the plaintiff's scientific book on the human voice constituted infringement because "...it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole." *Id.* at 303.

[5] The majority also stated that "[a]dditional reasons preclude a finding that much of the material is copyrightable", citing President Ford's testimony before the Hungate Committee and the use of conversations attributable to other persons. While we dispute the contention that this material standing alone

But these fears are unfounded. The individual would not become the "owner" of the event by being the first to depict it in words. He would become only the owner of his own description of the event. And even that ownership is subject to the limitation of the doctrine of fair use. Therefore, in determining whether a particular use is fair, a court applying this doctrine will consider all competing policy interests, including First Amendment interests.

The majority's rationale for limiting the scope of copyright protection also has no application to the facts of this case. Petitioners were not seeking protection for facts and memoranda in isolation, and in findings that are unchallenged, the District Court expressly found that these facts and memoranda:

> "...were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation." (B 10-11).

The restrictions the majority has placed on copyright protection are not limited to the memoirs of former Presidents. Under the broad language of the opinion, the new limitations

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(cont.)
is not copyrightable, it is not necessary to reach this issue. As the District Court stated,

> "This principle [that the copyright laws protect the totality of the facts and memoranda collected together with Ford's refections] governs the portions of Ford's memoirs reciting the statements of individuals other than Ford as well. I decline to enter the thicket of deciding which statements were exact quotations—and therefore not protected by copyright—and which were merely constructions of statements pieced together by Ford—and therefore copyrightable. I suspect that most were to some degree reconstructions. Suffice it to say that, simply viewed, I regard the historical facts, memoranda, and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." (citations omitted) (B 11).

will apply to all works of non-fiction (where extensive paraphrasing is permissible) and all works of news and history (where "expression" is limited to its "barest elements"). The number of literary works to which these new rules apply is significant indeed. For example, in 1982 alone there were 38,526 new titles (including new editions) published in the United States of which more than 25,000 were works of non-fiction. In the category of biography and history, there were in excess of 3,000 titles (including new editions). *The Bowker Annual of Library & Book Trade Information*, 372-3 (28th ed. 1983). Obviously the total number of books in print at any given time far exceeds the titles published in a single year.

Moreover, the limitations on what is protectible will not be limited to cases in which copyrighted material has been used by the news media. It will include any use of such material by anyone, including even directly competing uses, such as the publication of a competing textbook.

Equally important, the greatly increased use of copyrighted material permitted by the majority's holding on copyrightability will not be subject to any of the factors traditionally considered by a court applying fair use doctrine. The majority has, in effect, transformed a fair use question into an issue of copyrightability. There is a vast difference between sanctioning a use of material because the use is fair, and sanctioning such a use because the material is entitled to *no* protection at all. Under the fair use approach, a court will consider all factors relevant to the "equitable rule of reason" which the fair use doctrine embodies. The majority's approach, in contrast, precludes any consideration of these equitable considerations. A court following the majority approach must therefore sanction the use even if society derives no benefit from it, and indeed even if the use is harmful to important policies underlying the Copyright Act. As we shall demonstrate in Point II, that is precisely what happened in this case.

II

The Majority's Fair Use Analysis Did Not Strike The Proper Balance Between the Constitutionally Based Policy of Encouraging Authorship and the First Amendment.

The majority saw this case as requiring it to find the proper balance between "the author's monopoly of his original writings" on the one hand and "the citizenry's need to be informed" on the other. (A-24)

Both policies are important and, indeed, constitutionally based. Finding the right accomodation is an important function of the fair use doctrine. The majority, however, did not strike the proper balance.

On the copyright side, the majority referred frequently to the "monopoly" of the author, but nowhere acknowledged that underlying the monopoly is an important public policy. As this Court recently observed in *Sony Corp. v. Universal City Studios*, U.S. , 104 S.Ct. 774, 782, 78 L.Ed.2d 574 (1984):

> "...the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."

Moreover the majority downplayed authorship, as we have demonstrated in Point I, by defining what is protectible in such a way as to eliminate important elements of authorship. The majority thereby gave no consideration to the elements of authorship considered by the dissent: "method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original." (A 42).

Finally, by reason of its arbitrary definition of authorship, the majority saw the case as involving only a "very limited use

of copyrighted words" (A 29) and the taking of a "meager, indeed infinitesimal amount of Ford's original language." (A 30). Had the majority applied the correct standard, it would have faced a case involving extensive taking of expression.

On the free speech side of the balancing, the majority's analysis was equally defective. In the majority's view, application of the copyright laws to this use would "impede that harvest of knowledge so necessary to a democratic state." (A 4).

As publishers, we would be the first to recognize the importance of that policy, but it has nothing to do with this case. For there was nothing that the *Nation* did here that facilitated the harvesting of knowledge. The material was about to be published, as excerpts in *Time* magazine in about two weeks, and in full in book form about two weeks after that. The knowledge was going to be harvested in any event, by reason of authorized publications planned by the author and his publishers.

The majority nowhere acknowledges this. Nor does the majority make any attempt to demonstrate that society derived some benefit from publication in the *Nation* two weeks in advance of publication in *Time*, or four weeks in advance of publication in book form.

Rather than facilitating the harvest of knowledge, the *Nation* has simply taken upon itself the right to be the first publisher of President Ford's expression, a right expressly conferred on President Ford by the copyright laws and licensed for value to the plaintiffs. The editor of the *Nation* aptly characterized his own article when he said that he had "scoop(ed) former Preident Ford on his own memoirs". (PTX 22). It is that which the majority has sanctioned, not the harvest of knowledge.

The precedent set by this case will adversely affect both the incentives to authorship and the dissemination of information.

Under the holding it is clear that one may, with impunity, "steal" a manuscript and publish its contents, at least if one takes

care to paraphrase less than the entire work. If the manuscript is returned, no offense has been committed. In the majority's view "merely removing" under those circumstances constitutes "too insubstantial an interference with property rights to demonstrate conversion." (A 12-13). Nor is there any liability for trespass to chattels, for that requires "a showing of actual damage to the property interfered with." (A 13, fn. 5).

The sanctioning of such conduct will not only require a publisher to turn his publishing house into an armed camp. It will also impair his ability to license the publication of excerpts in advance of book publication. Aware of the import of the holding, publishers will know that if they circulate a manuscript to ascertain third party interest in acquiring such rights, there is a real risk that someone will take for free that which is being offered for sale.

This impediment to the exploitation of rights will lessen the incentive for authorship and adversely affect the dissemination of knowledge. Publication of excerpts in advance of book publication serves an important public purpose of disseminating knowledge of the contents of the book to the readers of the magazine, frequently an audience far larger than the readers of the book. To the extent that publishers are deterred by the majority holding from licensing pre-publication excerpts, that important public purpose will not be served.[6]

Indeed, this case illustrates such an adverse impact. Since *Time* cancelled its publication, the net result of the *Nation*'s publication was that excerpts from the manuscript were disseminated to the public not in *Time* magazine, but in the *Nation*, a magazine that obviously reaches a far narrower audience. It is ironic that this result was approved in the name of harvesting knowledge.

[6] The New York Times on March 16, 1984 reported that "[t]o insure against leaks" Random House had decided not to offer Governor Cuomo's new book to book clubs or magazines. The book was described by Governor Cuomo's agent as "one of the most thoughtful pieces of writing ever committed by a political figure" and the author as a "highly articulate, deeply introspective man writing about public life in a way that's enormously revealing without being invidious." The New York Times, at C22, col. 2.

The dissenting judge, whose view of the case was not distorted by the errors discussed above, concluded that the only freedom the majority has advanced here was the freedom to "chisel[] for personal profit." (A 48). The sanctioning of such conduct will surely have an adverse impact on authors and publishers.

III

The Majority Gave no Weight to the Facts That (a) The Use Was Non-Productive and (b) the Manuscript Was Unpublished. The Former Holding Conflicts With This Court's Decision in *Sony*. The Latter Conflicts With Clearly Expressed Congressional Intent.

The majority made two additional errors in its fair use analysis. First, in conflict with this Court's decision in *Sony*, the majority gave no weight to the undisputed fact that this was a non-productive use. As the dissent observed, the *Nation* article was "of trivial originality and contained no independent research by the author." (A 42). Apart from an introduction, which told of the publication plans for the book, and a conclusion, which promised a future article dealing with the ethics of what it had done, the *Nation* added only transition sentences and phrases. (Finding 36, C-22).

The majority openly acknowledged that it gave no weight to the fact that the use was non-productive, criticizing the dissent's requirement that "legitimate news add original commentary or contain original research." (A 26). The majority stated "[that] sounds distinctly like asserting that 'fair use' turns on the amount of the user's labor. The Second Circuit has rejected that approach." (A 26-27).

This holding that the non-productive nature of the use was entitled to no weight is inconsistent with the views recently expressed by this Court in *Sony Corp. v. Universal City Studios Inc.*, U.S. , 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

The entire Court in *Sony* believed that whether or not a use is productive is an important factor in determining fair use. Indeed the four dissenters believed that that factor was controlling. After setting forth several examples of fair use, the dissent stated:

> Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works to be used for "socially laudable purposes." ...I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. (emphasis in original; citations omitted) 104 S.Ct. at 807-08.

The majority in *Sony* disagreed only on whether the factor was determinative:

> Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. *Id.* at 795, n. 40.

There is no suggestion, in either opinion, that the non-productive nature of the use is entitled to no weight at all, as the majority here held.

Second, the majority erred in ignoring the fact that the manuscript was unpublished. Before the 1976 Copyright Act became effective, unpublished works were protected by common law copyright. At common law, the author clearly had "the exclusive right to the first publication" of his work. *Atlas Mfg. Co. v. Street & Smith*, 204 F. 398, 402 (8th Cir.), *appeal dismissed, Street & Smith v. Atlas Mfg. Co.*, 231 U.S. 348 (1913). It was acknowledged that, in the case of an unpublished work, "any use that others made of it might be unfair." *Fendler v. Morosco*, 253 N.Y. 281, 291, 171 N.E. 56, *reh'g denied*, 254 N.Y. 563, 173 N.E. 867 (1930). *See generally* A. Latman, *Fair Use of Copyrighted Works*, Study No. 14 in *Copyright Law Revision, Studies Prepared for the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960), (*reprinted in* 2 Arthur Fisher Mem. ed. 781, 785 (1963)).

When Congress passed the Copyright Act of 1976, it brought unpublished works under the ambit of Federal protection for

the first time. But Congress also recognized, for the first time, a separate statutory right of first publication. 17 U.S.C. §106(3), H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976). And in the legislative history Congress made clear its intent that the distinction between published and unpublished works was a factor to be weighed in the fair use analysis. Thus the Senate report states:

> "The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's right of first publication would outweigh any needs of reproduction for classroom purposes". S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975).

The District Court, in considering the nature of the copyrighted work under Section 107(2), therefore correctly concluded that "[t]he fair use defense is narrowed when the work is unpublished." (C 32). The majority, by ignoring this factor, disregarded both the prior copyright precedent, and the clear statement of Congressional intent.

The errors discussed in this Petition severely distorted the majority's analysis of a copyright case that has received widespread media attention, including a front page article in The New York Times (November 18, 1983, at A1, col. 2) and a lead editorial (November 19, 1983, at A24, col. 1). The errors also prejudicially affected the majority's review of the District Court's conclusion that the use was not fair. Given the facts of this case – the extensive use of expression from an unpublished manuscript, with no contribution by the user, with no benefit to society, and with an adverse economic impact on the copyright owner – the District Court's conclusion that the use was unfair should have been affirmed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 143, 261—August Term, 1983

(Argued September 14, 1983

Decided November 17, 1983)

Docket Nos. 83-7277, 83-7327

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiff-Appellees-Cross-Appellants,

—against—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants-Appellants-Cross-Appellees.

Before:

KAUFMAN, MESKILL, and PIERCE,

Circuit Judges.

Nation Enterprises and The Nation Associates, Inc. appeal and Harper & Row, Publishers, Inc. and The

Reader's Digest Association, Inc. cross-appeal from a judgment of the United States District Court for the Southern District of New York (Richard Owen, *Judge*), awarding damages for copyright infringement under the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, to Harper & Row and the Reader's Digest Association, and dismissing certain state law claims.

Reversed in part; affirmed in part. Judge Meskill dissents in a separate opinion.

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ANDREW L. DEUTSCH, New York, N.Y., *of Counsel*, and

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WEIL, GOTSHAL & MANGES, New York, N.Y.,

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KAUFMAN, *Circuit Judge*:

Almost ten years ago, this nation endured a grave threat to its domestic political life. The report of a burglary at Democratic National Headquarters in the Watergate complex of Washington, D.C. led to a historic constitutional confrontation. The President, suspected of involvement in covering up the crime and its partisan origins, pitted his will against the resolve of a Congress endeavoring to discover the true facts. The citizens of this country watched with awe as revelation after revelation

led finally to the first resignation of a President of the United States. This singular event was followed by another equally unprecedented act. Richard M. Nixon, not yet indicted for the commission of any crimes, was pardoned for any offenses by his successor in office, President Gerald Ford.

Reverberations from those shocks to the nation's constitution are still being felt, and this case is another of those repercussions. Two publishers have come before this court to urge that a magazine's use of material contained in the memoirs of Gerald Ford, and concerned in large part with the Nixon pardon, constitutes a violation of the Copyright Act, 17 U.S.C. §§ 101 *et seq.* Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. (hereinafter "Harper & Row" and "Reader's Digest," respectively) ask us to affirm the trial court's award of damages to them on grounds the Nation Enterprises and The Nation Associates, Inc. (hereinafter "the Nation") improperly took expression used by Ford in his book, *A Time To Heal*. Because we do not believe it is the purpose of the Copyright Act to impede that harvest of knowledge so necessary to a democratic state, we reverse. The trial court's dismissal of certain state law claims, however, is affirmed. Before turning to the law, we set forth the facts.

I.

If the first notes of this case were sounded during the days of Watergate, its earliest echo was an agreement consummated on February 28, 1977, one month after Gerald Ford had left the White House. At the time, the former President granted Harper & Row and Reader's Digest exclusive rights to publish his yet unwritten mem-

oirs. The book, according to Harper & Row, was to include, among other things, "the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford." By the terms of the contract, Ford acknowledged he must help to guard the value of those rights by avoiding participation in any "public discussion of the unique information not previously disclosed" about his career. He therefore agreed "not to disseminate any such information in any media . . . prior to publication." While "spontaneous and brief" comments were not to be considered a breach of contract, the publishing agreement was influential in Ford's later decision not to appear on an NBC television special in which the pardon was to be a central topic.

A professional writer, Trevor Armbrister, was hired to assist Ford in the process of gathering up strands of the past. Material was culled from a variety of sources including numerous interviews with public figures, among them Alexander Haig, Nelson Rockefeller, and Henry Kissinger. In addition, Ford and Armbrister made tape recordings in which the former President recollected both private and public aspects of his life. In February 1979, a first draft was completed by Armbrister. In addition to the information on the pardon of Nixon and events leading up to that historic choice, the book included depictions of Ford's childhood, his extensive career in Congress, his family life, his perceptions of a number of public figures, and the paths he followed after serving as President. Ford reviewed and edited this version of his experiences, and when it was near completion in March of that year, his publishers licensed to *Time* magazine the exclusive rights to print pre-publication excerpts in their issue of April 23rd. *Time* paid $12,500 in advance for this

privilege, and was to pay an additional $12,500 when its edition containing selected segments was complete.

But the resonant note of the past was not yet stilled. In late March 1979, an unidentified person brought a copy of the Ford manuscript to Victor Navasky, Editor of *The Nation*, a magazine devoted in large part to political commentary and news. Mr. Navasky testified, with no contradiction, that he had neither solicited nor paid for delivery of the book. Nor was he aware upon its receipt of *Time*'s pre-publication rights, although he did admit to realizing his temporary possession of the manuscript had not been authorized by Harper & Row or Reader's Digest. Believing the book to contain important political news, including heretofore undisclosed facts on the pardon, Navasky worked frenetically throughout a night and part of a weekend to read the memoirs in their entirety and select material germane to a news article before returning the copy to its source. He also consulted counsel concerning possible copyright violations and was advised that his proposed use was permissible.

On April 3, 1979, in an issue of *The Nation* dated April 9, 1979, the article which is the focus of this suit appeared. Navasky had learned by then of *Time*'s publication plans, although he remained unsure of the precise contents which that magazine intended to excerpt. An ironic detail of the case is that much of the information concerning the pardon turned out to have been already revealed by Ford during the 1974 Hungate Committee investigation of that Presidential decision. Navasky, however, was unaware at the time he wrote that his piece was a hybrid, history to those who knew these facts, news to those who did not. It is enough to add here that the Nation's receipts from newsstand sales were $418.00.

The magazine article, a copy of which is reprinted in the Appendix to this opinion, was approximately 2,250 words in length and was contained in three two-column pages. The manuscript, in comparison, was nearly 200,000 words and covered 655 typed pages. The first three paragraphs in *The Nation* piece summarized the factual highlights and announced the expected publication dates of *A Time To Heal* as well as the advance excerpts in *Time* and *The Reader's Digest*. That introduction was followed by nineteen paragraphs concerning the decision to pardon Nixon. Significant conversations are recorded, including several between then Vice President Ford and Alexander Haig and Ford and various of his associates. Portions of a memorandum written by Henry S. Ruth, Jr., an aide to Special Prosecutor Leon Jaworski, are quoted. In addition, Ford's reasons for the pardon are described, as is the fact that his emotional reaction to Nixon did not influence his choice. Finally, a brief paragraph on Ford's impressions of Nixon, ill with phlebitis following his resignation and pardon, is copied from the book.

The article then recounts information on Ford's relations with Kissinger and several other historically significant episodes, including the seizure of the MAYAGUEZ and Ford's decision to run for a full term as President. That material is followed by four paragraphs in which Ford's perceptions and evaluations of Nixon's character and actions, including Nixon's response to the awesome consequences of Watergate, are portrayed. The article then ends with a reference to the problem of the disclosure of political events like those described in *The Nation*, and mentions the *Washington Post*'s earlier unauthorized publication of excerpts from the memoirs of H.R. Halde-

man, one of Nixon's closest advisors during the Watergate period.

All the information contained in the article dealt with Ford's public and political life. Harper & Row and Reader's Digest describe the material used by *The Nation* as barely disguised paraphrasings or direct thefts of Ford's original expression. The Nation asserts it did no more than relate facts of momentous public import, particularly since Ford and Haig were then considered serious contenders for the 1980 Republican Presidential nomination. It claims it borrowed only the minimum expression essential to lend credibility to the piece. Because these conflicting characterizations of *The Nation* article are at the heart of this case, we return to them in our legal discussion.

On the day *The Nation* article appeared, Mr. Ray Cave of *Time* requested permission to publish the excerpts in its April 16, 1979 issue instead of the April 23rd issue as previously agreed. Because of what its counsel described as a careful program coordinating the *Time* printing and the book's release, Harper & Row refused. As a result, *Time* did not publish any of the manuscript, nor did it pay the additional $12,500. Harper & Row and Reader's Digest then brought this suit against the Nation for copyright infringement and for certain state law violations, including conversion.

The trial judge dismissed the state law claims upon motion, finding them preempted by the Copyright Act, 17 U.S.C. § 301. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 501 F. Supp. 848 (S.D.N.Y. 1980).[1] After a non-jury trial consuming six days, Judge Owen

1 Appellees' later motion to plead a further amended and/or supplemental complaint was denied on the same ground.

held that the Nation had infringed Harper & Row's and Reader's Digest's copyright and had failed to persuade him that they had made a "fair use" of the borrowed material. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 557 F. Supp. 1067 (S.D.N.Y. 1983).

II.

Because the state law claims were disposed of at the outset of this action, we consider those issues before turning to the more troublesome question of copyright infringement.

Harper & Row and Reader's Digest cross-appeal from the order dismissing these claims on grounds they are preempted by the Copyright Act. They urge us to find the Nation liable for conversion and tortious interference with contractual rights,[2] alleged harms arising out of the same facts on which the charge of copyright infringement is based.

The Copyright Act sets out the test for preemption of that state statutory or common law which may conflict with the federal policies embodied in the Act.[3] The

2 In their brief before this Court, cross-appellants curiously include a claim for "injury to the confidential manner in which publishers solicit sales of pre-publication serialization rights" among those dismissed by the district court. That claim was dropped from cross-appellants' complaint by their own amendment, and so was not before the lower court when it ruled on the dismissal motion. It is also not raised as an issue on appeal.

3 The Copyright Act, 17 U.S.C. § 301, states in pertinent part:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section 102 and 103, whether created before or after that date and whether published or

section contains a two-part analysis. First, the work of authorship in which rights are claimed must fall within the "subject matter of copyright" as defined in §§ 102 and 103 of the Act. Cross-appellants do not appear to contest that the Ford memoirs fall within the ambit of federal protection. In any event, the Act clearly embraces "[w]orks of authorship," including "literary works," as within its subject matter. 17 U.S.C. § 102. The fact that portions of the Ford memoirs may consist of uncopyrightable material, an issue discussed below, does not take the work as a whole outside the subject matter protected by the Act. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 131 (1976), U.S. Code Cong. & Ad. News 1976, p. 5747; *Durham Industries, Inc.* v. *Tomy Corp.*, 630 F.2d 905, 919 (2d Cir. 1980). Were this not so, states would be free to expand the perimeters of copyright protection to their own liking, on the theory that preemption would be no bar to state protection of material not meeting federal statutory standards. That interpretation would run directly afoul of one of the Act's central purposes, to "avoid the development of any vague borderline areas between State and Federal protection." H.R. Rep. No. 1476, *supra*, at 130.

The statute also requires that a state law create "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as

unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

* * * * * *

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.

specified in section 106"[4] if it is to be preempted. These include the rights "to reproduce the copyrighted work in copies" and "to prepare derivative works based upon the copyrighted work." When a right defined by state law may be abridged by an act which, in and of itself, would infringe one of the exclusive rights, the state law in question must be deemed preempted. *Oboler and Nostalgia Lane, Inc.* v. *Goldin, et al.*, No. 83-7153, slip op. at 5455 (2d Cir. Aug. 1, 1983); *Orth-O-Vision, Inc.* v. *Home Box Office*, 474 F. Supp. 672, 683-84 (S.D.N.Y. 1979); 1 *Nimmer on Copyright* § 1.01[B] at 1-11 (1983). Conversely, when a state law violation is predicated upon an act incorporating elements beyond mere reproduction or the like, the rights involved are not equivalent and preemption will not occur. *Factors, Etc., Inc.* v. *Pro Arts, Inc.*, 496 F. Supp. 1090, 1099 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981), *reh'g denied*, 701 F.2d 11 (2d Cir.), *cert. denied*, 102 S.Ct. 1973 (1983).

4 The Copyright Act, 17 U.S.C. § 106, states as follows:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Cross-appellants argue that neither of their state law claims allege rights equivalent to those created by the Act. With regard to the issue of conversion, cross-appellants seem unable to decide how to plead the factual elements supporting their claim. Their amended complaint asserted conversion based on the unauthorized publication of *The Nation* article. In this court, they propound a theory which rests the tort upon the unlawful possession of the physical property of the Ford manuscript. In doing so, they have placed themselves neatly upon the horns of a dilemma. If unauthorized publication is the gravamen of their claim, then it is clear that the right they seek to protect is coextensive with an exclusive right already safeguarded by the Act—namely, control over reproduction and derivative use of copyrighted material. As such, their conversion claim is necessarily preempted.

Alternatively, Harper & Row and Reader's Digest suggest it is the possession of the papers themselves which lays the foundation for their claim. Conversion, as thus described, is a crime involving acts—possession and control of chattels—which are qualitatively different from those proscribed by copyright law, and which therefore are not subject to preemption. Cross-appellants have failed, however, to state a conversion claim. Conversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor. *Citizens Nat'l Bank* v. *Osetek*, 353 F. Supp. 958, 963 (S.D.N.Y. 1973); *AMF Inc.* v. *Algo Distributors, Ltd.*, 48 App. Div.2d 352, 356, 369 N.Y.S.2d 460, 464 (2d Dep't 1975); 1 F. Harper & F. James, *The Law of Torts* § 2.15 (1956); *cf. Restatement (Second) of Torts* § 222A (1965). Merely removing one of a number of copies of a manuscript (with or without permission) for a short time,

copying parts of it, and returning it undamaged, constitutes far too insubstantial an interference with property rights to demonstrate conversion.[5] *See Pearson* v. *Dodd*, 410 F.2d 701, 707 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969). Thus, whatever factual predicate they choose, Harper & Row and Reader's Digest cannot succeed on this ground.

With respect to the claim of tortious interference with contractual relations, cross-appellants' statement of the cause of action in their complaint suggests its infirmity. They allege that cross-appellees have committed a tort "by destroying the exclusive right of an author and his licensed publishers to exercise and enjoy the benefit of the pre-book publication serialization rights." If there is a qualitative difference between the asserted right and the exclusive right under the Act of preparing derivative works based on the copyrighted work, we are unable to discern it. In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that it could not possibly be deemed a separate element. *See* 1 *Nimmer on Copyright* § 1.01[B], at n.46 (1983). As the trial court noted, the fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright

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5 Interference with the personal property of another which does not rise to the level of conversion may constitute the lesser tort of trespass to chattels. *See Restatement (Second) of Torts* §§ 216-222 (1965). Cross-appellants at one point hinted at such a claim. After Judge Owen dismissed the state law counts in their complaint, they sought permission to make a second amendment adding claims of, *inter alia*, "trespassing upon plaintiffs' rights to its business documents . . . ." *See* note 1, *supra*. Their motion to amend was denied, and the issue has not been raised here. Cross-appellants could not succeed on this claim in any event, since liability for trespass to chattels exists only upon a showing of actual damage to the property interfered with. F. Harper & F. James, *supra*, § 2.3.

infringement claim, goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental non-equivalence between the state and federal rights implicated. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 501 F. Supp. at 853-54; *accord*, *Kamakazi Music Corp.* v. *Robbins Music Corp.*, 522 F. Supp. 125, 137 (S.D.N.Y. 1981), *aff'd*, 684 F.2d 228 (2d Cir. 1982).

We therefore hold that cross-appellants cannot prevail on either of their state law claims, and proceed to an examination of the copyright infringement claim.

III.

The trial court began its opinion on copyright infringement by considering whether *The Nation* article was news reporting and, if so, whether *The Nation* had made a "fair use" of the memoirs. As a result, it did not face, at the outset, the threshold issue whether the material used by the magazine was copyrightable. We commence this part of our discussion, then, by turning our attention to that question, putting aside the matter of "fair use" until we have decided if any use of copyrighted expression did, in fact, occur.

A.

The Copyright Act, enacted pursuant to Article I, § 8, cl.8 of the United States Constitution, protects only original works of authors. 17 U.S.C. § 102(a).[6] The

6 This section reads in pertinent part:

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

• • •

statute grants rights not in ideas or facts, but in expression, 17 U.S.C. § 102(b).[7] The Act is thus able to protect authors without impeding the public's access to that information which gives meaning to our society's highly valued freedom of expression. *See* 1 *Nimmer on Copyright* § 1.10[B][2], at 1-72 (1983). Courts have accordingly held that neither news events, *Time Incorporated* v. *Bernard Geis Associates*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968), *citing International News Service* v. *Associated Press*, 248 U.S. 215, 234 (1918), historical facts, *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), nor facts of a biographical nature, *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), is deserving of the protection of the Act. *See also Wainwright Securities, Inc.* v. *Wall Street*

7 17 U.S.C. § 102(b) reads:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

One reasonable interpretation of the word "discovery" in the statute is "fact." For example, an historian who learns in his research that a certain event occurred has discovered a fact. *See* 1 *Nimmer on Copyright* § 2.11[A], a 2-157 (1983). The Congressional intent to ensure a free communication of facts and information is explicitly addressed in the House Report which states: "Copyright does not preclude others from using the ideas or information revealed by the author's work." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5656, 5670.

Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).[8]

The distinction between fact and expression is not always easy to draw. There are, however, several general principles according to which that boundary may be mapped for works in which much factual material is described. An author's originality exists, in part, in his overall arrangement of facts. The structure he chooses for the work as a whole is important. *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, 558 F.2d at 94, and *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974). In this case, there can be no concern that this mode of expression was usurped; *The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic.

Harper & Row and Reader's Digest insist, however, that a second expressive mode, the author's chosen language, was taken by virtue of short segments of verbatim quotation and the liberal use of paraphrasing. While we agree some of Ford's literal words were copyrightable,[9] a conclusion to which we will return in our discussion of "fair use," we reject the argument that paraphrasings of disparate facts such as those found in this case constitute an infringement of copyrightable material. The dissent's blanket statement that paraphrasing is the equivalent of copying is simply inaccurate. The cases in which that equation is made differ significantly from this litigation. They concern instances in which an alleged infringer borrowed virtually an entire work and attempted to avoid liability by doing little more than changing the verbatim language or slight details in the structure.[10] The dissent's generalization about paraphrasing is valid when applied to such cases for reasons once stated by Judge Learned Hand:

> It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text else a plagiarist would escape by immaterial variations. *Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (1930).

If *The Nation* had taken, for example, all of the book or all of a chapter and merely changed the language here and

8 Our brother Meskill, in dissent, takes issue with our discussion of the copyrightability of facts. The comments in the dissenting opinion, however, indicate a confusion between the copyrightability accorded to "compilations" of facts, with which we do not take issue, and the copyrightability of the "preexisting material" or facts making up those compilations. 17 U.S.C. § 103. Each of the cases on which our dissenting brother relies involves a listing of names, nouns, or information. Those listings, qua lists, are indisputably copyrightable as compilations, and nothing in our opinion asserts the contrary. But the preexisting facts contained within those lists are not protected. In short, while acknowledging elsewhere that the effect of the cited "cases is not to provide protection for the facts themselves but for the author's original articulation and presentation," the dissent nevertheless seems to fail to distinguish the protected whole (the "compilation") from its unprotected parts (the "preexisting material"). The result is the inappropriate application of authorities concerning fact compilations to this case involving a literary work which is predominantly factual in nature, as are histories and biographies.

As discussed, *infra*, this confusion, in the dissenting opinion, concerning the copyrightability of facts created further misunderstanding concerning paraphrasing of verbatim language in the dissenting opinion.

9 We say "some" and not "all" because some of Ford's verbatim language consists of statements or conversations of other persons. As we discuss, *infra*, such material is not copyrightable by Ford.

10 In *Donald* v. *Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), for example, a printed legal "Agreement" was apparently taken from a form book and only slightly reworded. In *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974), Meredith took an entire textbook and proceeded to "rewrite" it in minor ways to produce another text.

there, paraphrasing would not and should not suffice to protect it.

But that is not this case. Here, *The Nation* drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words. This is precisely the situation to which Nimmer refers in his treatise when he writes:

> What if the defendant has copied neither the plaintiff's word for word form of expression, nor the selection and arrangement of plaintiff's facts, but has nevertheless copied one or more facts which appear in plaintiff's factual work? Here the answer on principle should be that plaintiff cannot establish copyright infringement." 1 *Nimmer on Copyright* § 2.11[E] at 2-164 (1983).[11]

Our dissenting brother's excessively broad generalization about paraphrasing fails to recognize the essential need to strike a definitional balance between the First Amendment and the Copyright Act by permitting the free communication of facts while still protecting an author's expression. A construction of the Act insisting it is impermissible copying to paraphrase discrete facts ignores the unambiguous legislative history which establishes that "information" is not protected. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56 *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5670. Were information copyrightable as the dissent implies, the Act would clash with the First Amendment on every occasion in which an

11 Nimmer points to a line of cases which have held otherwise on the basis that the author's labor, rather than his writings, are protected by the Copyright Act. 1 *Nimmer on Copyright* § 2.11[E] at 2-166 (1982). The Second Circuit, however, has explicitly repudiated these authorities and that reasoning in *Hoehling* v. *Universal City Studios, Inc.*, *supra*, 618 F.2d at 979.

author chose to put in his own words facts which had already been described by another writer. *See generally* Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983 (1970).

Nowhere could the need to construe the concept of copyrightability in accord with First Amendment freedoms be more important than in the instant case. Here we are presented with an article describing political events of major significance, involving a former President of the United States. The paraphrasings concern the very essence of news and of history. In such works, courts have carefully confined that troublesome concept "expression" to its barest elements—the ordering and choice of the words themselves. *See Hoehling* v. *Universal Studios, Inc.*, *supra*, 618 F.2d at 974. Were "expression" in this context given a broader terrain, an individual could be the owner of an important political event merely by being the first to depict that event in words. *See International News Service* v. *Associated Press*, *supra*, 248 U.S. at 234, and Brief for Pen American Center, *Amicus Curiae*, at 21-25.[12]

The trial court, however, would have us accept a novel theory concerning the copyrightability of historical fact and memoranda. It found such material integral to "Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*,

12 A comment by Professor Nimmer is particularly relevant to this case. He states: "While freedom of speech generally is not impermissibly abridged by copyright protection for 'expression,' to grant a copyright monopoly to facts as such would constitute an intolerable limitation on First Amendment rights. Would anyone seriously suggest that the Washington Post was deserving of a copyright on the facts of the Watergate incident because its reporters, Woodward & Bernstein, through considerable labor, expense and ingenuity, discovered such facts?" 1 *Nimmer on Copyright* § 2.11[E] at 2-167 (1982).

supra, 557 F. Supp. at 1073. As a result, the court conferred copyright protection on material it admitted was not "*per se* copyrightable." *Id.*, 557 F. Supp. at 1072. The core of the court's reasoning appears to be grounded in its statement that "it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to the Nation. Correspondingly, it is this same totality that is protected by the copyright laws." *Id.*

Two assumptions seem to inhere in this reasoning. The district court appeared to believe Ford's "revelations as to his state of mind," standing alone, were copyrightable. *Id.*, 557 F. Supp. at 1073.[13] Appellees agree, urging in their brief that this element of the autobiography of a public official is precisely that personal and subjective note which renders it the essence of expression. We need not decide here whether these depictions belong more properly to the sphere of fact or that of expression, for with the exception of a word or two, they are taken verbatim from the book, and the literal words are unquestionably copyrightable. But we note in passing, though it is true these responses did originate with Ford and might

13 The opinion is not explicit about the precise "revelations" to which it is referring. The court had adopted Plaintiffs' Proposed Findings of Fact and Conclusions of Law as its own Supplemental Findings of Fact after excising certain paragraphs, but a list of examples of Ford's "subjective feelings" was one of those portions which was crossed off. Judge Owen's handwritten amendment to these findings, which states: "The fact that certain proposed findings herein are excised does not mean that the Court finds that the record does not support them . . . .", does not answer the inquiry whether those instances were the "reflections" to which the court then referred in its opinion. We will surmise that, at the least, Ford's statements concerning the effects on the pardon decision of his compassion for Nixon, and his philosophy from Yale Law School are included. His mention of "hurt" upon learning that Nixon had not told him the truth may also be such a revelation.

be accurately described as his unique perspective, it seems to defy common sense to declare that the "states of mind" which play a role in the crucial political decisions of public officials are any less "fact" than any act which such an official may choose or not choose to undertake.[14]

Accepting, however, that the verbatim "reflections" in this case are "expression", the district court's second assumption, that their coupling with uncopyrightable fact transformed that information into a copyrighted "totality," is an erroneous construction of the statutory "subject matter." 17 U.S.C. § 102. That conception of the law is tantamount to permitting a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting the work's entire contents are thereby made his alone by virtue of copyright. The Copyright Act was not intended to provide such a private monopoly of fact at the expense of the public's need to be informed. *Hoehling* v. *Universal City Studios, Inc.*, *supra*; *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).[15]

14 Judge Meskill calls into question our comment concerning "states of mind" as facts. If he means by his statements that a man owns his own state of mind until he writes it down, we agree. If he means that a man owns the "expression" of his state of mind (e.g., the verbatim language), we are also in agreement. If he means, however, that the state of mind itself, when expressed in different words, may not be written down by another without a copyright infringement having occurred, we respectfully disagree for reasons stated in our discussion of the copyrightability of facts and of paraphrase.

15 The dissent attempts to distinguish away our reliance on *Hoehling*, *supra*, by pointing out that the alleged infringer in that case added something original to the historical or biographical information taken. Regardless of the accuracy of this observation, it has nothing to do with the question of the copyrightability of the work from which the facts were gleaned. If any consideration of the originality of *The*

Additional reasons preclude a finding that much of this material is copyrightable. A great deal of the information concerning the pardon decision was presented by President Ford before the Hungate Committee and subsequently printed in a government document. *Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 93rd Cong., 2d Sess. at 90-151 (1974). This material was a "work of the United States Government," 17 U.S.C. § 105, and hence not copyrightable.[16] *See also* 1 *Nimmer on Copyright* § 4.04, at 4-17 (1982). No individual can claim such matter as his own. *Greenbie* v. *Nobel*, 151 F. Supp. 45, 66 (S.D.N.Y. 1957).

Moreover, the use of conversations attributed to other persons cannot be a borrowing of copyrighted material, because of the Act's requirement, 17 U.S.C. § 102(a),[17] that an author's work be his own and not originate in others. *See Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 798 (S.D.N.Y. 1971).

Nation article is appropriate, and we do not suggest that it is, such observations belong to the discussion of "fair use" of copyrighted material, not to the discussion of whether the historical and political facts described in *A Time To Heal* were copyrightable.

16 17 U.S.C. § 105 states: "Copyright protection under this title is not available for any work of the United States Government . . . ." 17 U.S.C. § 101 defines a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties."

We need not decide here whether § 105 or its predecessor, the former § 8, controls the Hungate Committee material. Under either section, this printed work would not be copyrightable. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58 (1976).

17 *See supra* n.6.

The same originality criterion applies to the memorandum written by Henry S. Ruth and taken by Trevor Armbrister from a copyrighted book by Leon Jaworski.

Appellants ask us to find that the words Ford spoke when he was in office may not be copyrighted by him as they, too, are "work[s] of the United States Government." 17 U.S.C. § 105. We cannot go so far. The conversations originated with Ford, and, unlike the testimony before the Hungate Committee, were neither fixed as "writings" nor publicly delivered as part of any person's "official duties." 17 U.S.C. § 101. Indeed, it pushes language beyond its common sense bounds to characterize Ford's conversational words as "a work prepared" by him. *Id.* Although another may pluck the facts from unrecorded words uttered by a public official while carrying out his public tasks, the phrasing of the sentence itself may be copyrighted by that official if and when it is later written down.

When the uncopyrighted material is stripped away, the article in *The Nation* contains, at most, approximately 300 words that are copyrighted. These remaining paragraphs and scattered phrases are all verbatim quotations from the memoirs which had not appeared previously in other publications. They include a short segment of Ford's conversations with Henry Kissinger and several other individuals. Ford's impressionistic depictions of Nixon, ill with phlebitis after the resignation and pardon and of Nixon's character, constitute the major portion of this material. It is these parts of the magazine piece on which we must focus in our examination of the question whether there was a "fair use" of copyrighted matter.

B.

The Copyright Act provides two mechanisms by which the rights of a copyholder may be protected without impeding the public's access to information. The first of these devices, the distinction between expression, which is copyrightable, and idea or fact, which is not, has been discussed above. The second means of ensuring a proper balance of the citizenry's need to be informed and the author's monopoly of his original writings is known as the doctrine of "fair use." *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, at 558 F.2d at 94. This common law concept, now embodied in the Copyright Act, permits the limited use of copyrighted material without the author's consent for purposes "such as criticism, comment, news reporting, teaching . . ., scholarship, or research . . . ." The court is required to consider at least four factors in deciding whether a particular use was fair. 17 U.S.C. § 107.[18]

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18 This section of the statute states:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether use made of a work in a particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use on the potential market for or value of the copyrighted work.

The trial court characterized its task as deciding "whether the Nation's article was 'news reporting', and, if so, was a 'fair use' of the materials taken." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F. Supp. at 1070. We find the court's conclusion that "the piece was not such news, 'hot' or otherwise, as to permit the use," *id.*, 557 F. Supp. at 1072, to be clearly erroneous for several reasons. The testimony of Navasky that his purpose in writing the article was news reporting was uncontradicted. In addition, three expert journalists testified to the news purpose of *The Nation* piece. Even in the absence of such expertise, however, our own examination of this article concerning a new book on the actions of the highest public officials in their official positions leads us to conclude that it must be characterized as the reporting of either news or of recent history. While it is true, as appellees state, that mere allegations of news reporting are insufficient grounds for permitting the copying of the expression in a protected work, this is not a case such as *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), in which the media made use of someone's "entire [expressive] act" while claiming it was fulfilling a news function. Furthermore, there was no evidence of that "chiseling for personal profit" which led this Court in *Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, 558 F.2d at 97, to find a claim of news reporting was merely a pretext.

Moreover, a careful reading of the opinion reveals that the district judge decided the piece was not news reporting because it contained insufficient "hot news" to be so classified. The court, in short, substituted its own views concerning the quality of the journalism in *The Nation* article, and then determined that it was not news because it was not good or genuine news. There is no indication in

either the statutory language or the case law that determination of fair use should turn on the question of how well a given purpose was performed. Indeed, this Court has eschewed judicial evaluation of quality in fair use analysis. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*. The authority on which the court relied, *Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, is concerned not with the quality of an alleged news report, but with whether labelling the use of another's financial analyses and predictions "news reporting" was a pretext for usurping a creative effort.

We fully agree with our brother Meskill that courts should be "chary" of deciding what is and what is not news. We fear, however, that he has not followed his own admonition. His dissent proceeds to describe what a news article "might choose to include" and then asserts later in his opinion, that 'legitimate coverage of a news event,' *id.*, will thus contain original material." We are of the view that the recounting of information, without more, would seem to be the very essence of "news reporting." Our main concern, however, is that the task of courts in "fair use" analysis should be understood not as deciding what makes bona fide news, but as examining whether a claim of "news reporting" is false.[19]

Furthermore, our brother Meskill's requirement that legitimate news add original commentary or contain original research sounds distinctly like an assertion that "fair use" turns on the amount of the user's labor. The Second

19 The dissenting opinion's reliance on *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, is inapposite. The infringer in that case, the Wall Street Transcript, made use of Wainwright's "financial analyses and prediction." It did not simply report scientific, historical, or financial facts in its own words. In addition, the Transcript's repeated printing of Wainwright's financial analyses differs significantly from *The Nation*'s one-time use.

Circuit has rejected that approach.[20] In *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at 310, this court wrote:

> It is just such wasted effort [as having to do original research, for example] that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent. *See* Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569, 1584 (1963). *Id.*[21]

Judge Owen then proceeded to dispose of each of the four "fair use" factors which must be considered, 17 U.S.C. § 107. He found the "purpose or character" was that "the article was published for profit." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F. Supp. at 1072. But the fact that profit was involved is, without more, legally irrelevant where the work in which the use appears offers some benefit to the public. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, *supra*, 366 F.2d at 307.

The court's analysis of the second of the factors, the "nature of the copyrighted work," was also faulty, for it ignored the essentially factual nature of the book. No consideration was given to the fact that copyright protection of such works is narrow, *Hoehling* v. *Universal Studios*, *supra*, 618 F.2d at 974. Moreover the court did not examine which portions used by *The Nation* were

20 We have also explicitly rejected that approach in relation to copyrightability. *See* note 11, *supra*.

21 The use by *The Nation* of no more than 300 copyrighted words from a book of approximately 200,000 is not such a "bodily appropriation," *id.*, as would call for an exception to this statement or militate against a finding of "fair use."

deserving of such protection. This approach led to its erroneous conclusions concerning a copyrightable "totality."

The treatment of the third and fourth factor is colored by this erroneous "totality" analysis. The court noted *The Nation* article had used "the heart of the book," a statement based on a finding that material dealing with the Nixon pardon had been taken. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F. Supp. at 1072. This conclusion, even if correct, is irrelevant, for the "heart" to which the court makes reference is factual information of great public import, and not the expression or the "analyses and predictions," *Wainwright Securities, Inc.* v. *Wall Street Transcript Corporation*, *supra*, 558 F.2d at 96 which are protected by copyright. The quantitative amount of copyrighted words, some 300 in an article of over 2,250, is insubstantial. The court found "economic impact" because "the effect of *The Nation*'s extensive use of the Nixon pardon material caused the *Time* agreement to be aborted . . . ." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, *supra*, 557 F.2d at 1072. But, as we have indicated, almost all that material was uncopyrightable information in which Harper & Row and Reader's Digest may not claim ownership. At the same time, the evidence does not support a finding that it was the very limited use of expression per se which led to *Time*'s decision not to print excerpts. The district court erred, in short, in its analysis of the "fair use" factors.

The copyrightable material used by *The Nation* was, for the most part, either Ford's own words in conversations or his portrayals of Richard M. Nixon. The brief conversational passages are no more than Ford's replies to the statements of others. They lend authenticity to this

politically significant material. The short descriptions of Nixon's character provide the reader with a means of evaluating Ford's estimate of Nixon and his claim that he did not act out of compassion in granting a pardon, thus complementing the reporting of the facts. In sum, the quotations are informative and are neither superfluous or excessive for the article's purpose. We reject the notion that this very limited use of copyrighted words is sufficient "to supersede the use of the original work." *Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4909l).

Where information concerning important matters of state is accompanied by a minimal borrowing of expression, the economic impact of which is dubious at best, the copyright holder's monopoly must not be permitted to prevail over a journalist's communication. To decide otherwise would be to ignore those values of free expression which have traditionally been accommodated by the statute's "fair use" provisions. *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, 558 F.2d at 95. We conclude, accordingly, that there was a "fair use" of copyrighted material in this case.

IV

We have been asked to examine complex questions concerning the Copyright Act and the memoirs of a public official. Throughout our consideration, we have been guided by our conviction that the statute was not meant to obstruct the citizens' access to vital facts and historical observations about our nation's life. By far the greatest part of the article in *The Nation* was no more than the reporting of information concerning political decisions at the highest level of government. These facts were sown in and gathered from the shared ground of our

country's history. They are the "property of all," *Hoehling* v. *Universal City Studios, Inc.*, *supra*, 618 F.2d at 974. The magazine took a meager, indeed an infinitesimal amount of Ford's original language. We do not believe the Act was intended to chill the activities of the press by forbidding a circumscribed use of copyrighted words, as we have indicated.

Accordingly, we reverse the finding of copyright infringement and the award of damages and affirm the dismissal of Harper & Row's and Reader's Digest's state law claims.

APPENDIX

The Ford Memoirs Behind the Nixon Pardon

In his memoirs, *A Time To Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

"It's my understanding from a White House lawyer," Haig replied, "That a President does have authority to grant a pardon even before criminal action has been taken against an individual."

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six

Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at the moment," he writes, "the whole house of cards might have collapsed."

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information—i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

> "If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action

could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response. Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente,

he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Let's get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Zeigler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible."

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death.

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought

he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the *Mayaguez*. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the *Coral Sea* make surgical strikes against specific targets."

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

In February of last year, when *The Washington Post* obtained and printed advance excerpts from H.R. Haldeman's memoir, *The Ends of Power*, on the eve of its publication by Times Books, *The New York Times* called *The Post*'s feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here—a First Amendment principle that was central to the Pentagon Papers case."

In the issue of *The Nation* dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

MESKILL, *Circuit Judge*, dissenting:

I share fully the majority's view that the copyright laws should not be used to impede the public's vital access to information and knowledge. However, in its endeavor to reaffirm the important role of a free press in our democracy, the majority fails to articulate clearly the legal principles on which it relies. Because I believe that a more precise legal analysis leads to a different result here, I must respectfully dissent.

I

The majority concedes that "A Time To Heal" is copyrightable, but refuses to accord it copyright protection because *The Nation* supposedly took "facts" and not "expression" from the work. The majority tries to ascertain whether the contents of certain passages of the memoirs are themselves copyrightable, even though copyright protection is not given to passages but to a work as a whole.

I disagree with the majority's statement that President Ford's description of his state of mind at the time of the Nixon pardon is a fact not entitled to copyright protection. The majority maintains that "states of mind" which play a role in the crucial political decisions of public officials are as much "fact" as any act the official may take. While a person's state of mind is a "fact," his expression of his state of mind is not. Because state of mind is elusive and not susceptible to empirical proof, an author's state of mind is what the author describes it to be. This description may be accurate or a *post hoc* rationalization or downright false, but it is truly the reflection of the author at the time of writing and is therefore expression entitled to protection.

But I will assume *arguendo* that "states of mind" are fact because the majority opinion has a greater flaw. The opinion concludes that because the passages in question contain "facts," paraphrasing these factually-oriented passages cannot constitute copyright infringement. It thus confines its discussion of copyright infringement to "approximately 300 words that are copyrighted."

I do not agree with the majority position that printed facts are never entitled to the protection of the copyright laws. It is no less a copyright infringement to reproduce copyrightable works consisting of "facts" than to reproduce those consisting of "expression." There are many cases which hold that copying of works largely comprised of facts constitutes copyright infringement. *See, e.g., Schroeder* v. *William Morrow & Co.*, 566 F.2d 3 (7th Cir. 1977) (copying of names and addresses of gardening suppliers from plaintiff's listings and descriptions of same held to constitute infringement); *Adventures In Good Eating, Inc.* v. *Best Places To Eat, Inc.*, 131 F.2d 809 (7th Cir. 1942) (infringement to copy restaurant listings); *Quinto* v. *Legal Times of Washington*, 506 F.Supp. 554 (D.D.C. 1981) (infringement to reprint most of article describing perquisites offered by law firms and containing interviews with summer associates, even though article consisted primarily of facts or data in public domain); *Northwestern Bell Telephone Co.* v. *Bedco of Minnesota, Inc.*, 501 F.Supp. 299 (D. Minn. 1980) (infringement to copy and publish information in telephone directory without independent research). *See generally* Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963); 1 M. Nimmer, *Nimmer on Copyright* §§ 2.04[B], 2.11[D] (1983). This Court has acknowledged that verbatim copying of a factual work is actionable as copyright infringement. *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). Paraphrasing, which is what took place here, is the equivalent of copying for purposes of the copyright laws. *See, e.g., Donald* v. *Zack Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); *West Publishing Co.* v. *Edward Thompson Co.*, 176 F. 833, 838 (2d Cir. 1910); *Addison-Wesley Publishing Co.* v. *Brown*, 223 F.Supp. 219, 227-28 (E.D.N.Y. 1963).

Whether there is a copyright infringement simply turns on whether there has been an unlawful appropriation of copyrightable work. In *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F.Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974) (per curiam), Meredith published a textbook on child development which was merely a rewriting and rearrangement of a Harper & Row text in the same field. The Meredith text was held to infringe on the Harper & Row copyright even though the text contained some independent ideas of the author. Similarly, in *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), defendant's abstracts of plaintiff's copyrighted[1] financial reports were held to be copyright infringement.

The effect of the above cases is not to provide protection for the facts themselves but for the author's original articulation and presentation of the facts. Copyright laws protect originality. They are meant to safeguard the embodiment in a tangible medium of an author's intellectual labors. *See* 17 U.S.C. § 102(a) (1982); *Higgins* v. *Keuffel*, 140 U.S. 428, 431 (1891). They thus offer protection

1 The term "copyrighted," as used in this dissent, assumes that the copyright is valid.

against a work that is substantially an unoriginal appropriation of the copyrighted work, *i.e.*, "substantially similar." *See Warner Bros. Inc.* v. *American Broadcasting Companies, Inc.*, 654 F.2d 204, 207-08 (2d Cir. 1981) (discussing the "substantially similar" test of copyright infringement). Consequently, while a second author may feel free to use facts that are in the first work, he cannot appropriate expression, method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original. *Wainwright*, 558 F.2d at 95-96.

In the cases relied on by the majority, most notably *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), and *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), the allegedly infringing works were original. In *Hoehling*, this Court refused to find copyright infringement where the second author relied on the first work for some facts but wrote his own original account, did a great deal of original research and did not copy or paraphrase any part of the book (although he used some of the same literary devices as did the first author). Similarly, in *Rosemont*, no infringement was found where the second author wrote an original biography, did a substantial amount of original research and copied only a few passages for his 304-page work. These cases are distinguishable from the instant case in which the *Nation* article, almost entirely a paraphrase, was of trivial originality and contained no independent research by the author. Thus, this case has no similarity to *Hoehling* and *Rosemont*; culling language about facts from those cases does not alter the reality that the allegedly infringing works in those cases were original while the *Nation* article was not.

To determine whether the allegedly infringing work appropriates the originality of the protected work, a comparison of both works in their entirety is necessary. Judge Owen's view that the "totality" of the memoirs is protected is not erroneous. Taking into account all of the factors that make a work original, the question of infringement becomes much more a decision to be made on a case-by-case basis than a mechanical determination based on the number of "words that are copyrighted" in the allegedly infringing work. This case-by-case approach is consistent with the prevailing law that determining whether there is "substantial similarity" between two works is a question to be determined by the trier of fact. *See, e.g., Ideal Toy Corp.* v. *Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966).

The majority's fear that an affirmance here would "[permit] a public official to take private possession of the most important details of a nation's historical and political life by adding language here and there . . . ." is unjustified. *The Nation* was perfectly free to use whatever facts were contained in Ford's memoirs as part of its own *original* work. What *The Nation* could not do was compile a work purportedly reporting certain "facts" that did no more than appropriate the same quotes, expressions, selection of language, events, corroboration and recreations that were present in the Ford memoirs and that added nothing original of its own.

Thus, *The Nation*'s paraphrasing of parts of the Ford memoirs constitutes copyright infringement under 17 U.S.C. § 501 (1982) unless it falls within the "fair use" exception.

II

The "fair use" exception, now codified at 17 U.S.C. § 107 (1982), allows certain unauthorized uses of copyrighted material without civil liability if those uses advance social, educational or scientific causes. *See, e.g., Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 544-45 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). The heart of the fair use doctrine is that a secondary use of an original work may be tolerated if the use has social value or is valuable for the information it disseminates. *See, e.g., Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973) (large-scale photocopying of medical articles by government research institute and its library), *aff'd by an equally divided court*, 420 U.S. 376 (1975) (per curiam); *Loew's Inc.* v. *Columbia Broadcasting System*, 131 F.Supp. 165, 175-76 (S.D. Cal. 1955) (discussing the use of extensive quotations in reviewing the fair use doctrine), *aff'd sub nom. Benny* v. *Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (per curiam). The fair use doctrine strikes the balance between the First Amendment and the Copyright Act, or between "the public interest in the free flow of ideas and information [and] the copyright holder's interest in exclusive proprietary control of his work." *Roy Export Company Establishment of Vaduz, Liechtenstein* v. *Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1099 n.9 (2d Cir.), *cert. denied*, 51 U.S.L.W. 3254 (U.S. Oct. 4, 1982). Undoubtedly, the value in ensuring the public's access to knowledge is the reason news reporting exemplifies fair use. Thus, if *The Nation*'s article constituted a dissemination of news it might be protected as a "fair use" of the Ford memoirs.

I agree with the majority that the holding below that the *Nation* article was not news was clearly erroneous. Courts should be chary of deciding what is and what is not news. Certainly there is news value in the fact that a former president of the United States has written a book detailing his state of mind and motivation in pardoning his predecessor. *The Nation* was free to print an article disclosing that fact and describing the book. Some of the things it might choose to include are the publisher's name, publication date, price and topics covered. The fact that an article covers a newsworthy subject or event, however, does not automatically eliminate the author's rights in his literary property. There are limits to what a news article may legitimately take from a copyrighted work.

That the article contains news is only the beginning of the inquiry into whether it constitutes fair use of the copyrighted material. The court must also consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3) (1982). A news article is only a fair use if it takes what is fair and reasonable for the news story. Otherwise a news publication could with impunity run a story stating that a public figure authored a copyrighted book and then reprint the entire contents of the book. In that situation no one would argue that the newsworthiness of the book would insulate the publisher from civil liability.

Keeping in mind that "fair use" is an equitable doctrine, I believe that the *Nation* article did not constitute a fair use of "A Time To Heal." An article that merely announces the existence of a not-yet-published book and says to the readership, "This is a short abstract of what is in the book," cannot qualify as a fair use. A similar claim

of "news reporting as fair use" was rejected in *Wainwright*:[2]

> Unlike traditional news coverage . . . the Transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysts; and it did not include any criticism, praise, or other reactions by industry officials or investors. . . . This was not *legitimate* coverage of a news event . . . .

558 F.2d at 96 (emphasis added).

"Legitimate coverage of a news event," *id.*, will thus contain original material. *The Nation* might have corroborated or contrasted Ford's description of the events with other accounts; it might have focused on other statements by Ford to put the memoirs in context; it might even have included a sketch of why the book was important and what effect the events in the book, which occurred almost a decade ago, had on the nation's history. It could also have compared the Ford memoirs to the known record, which one of defendant's experts said "is the big part of the job of a working journalist . . . ." App. at 369 (testimony of F. Friendly). It did none of these. I do not mean to suggest that any of these are the *sine qua non* of a news story, but *The Nation* chose to rely exclusively on the copyrighted Ford memoirs for its story; it added nothing at all original. *Rosemont* counseled that such "extensive verbatim copying or paraphrasing" could not satisfy the fair use standard. 366 F.2d at 310.

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2 In *Wainwright*, we held that defendant's abstracts of plaintiff's financial reports did not constitute a fair use partly because the abstracts were not "legitimate" news reports and partly because they had the "obvious intent . . . of fulfilling the demand for the original work . . . [and constituted] chiseling for personal profit." 558 F.2d at 96-97.

The passage describing Ford's impression of Nixon ill in bed is just one illustration of the article's lack of originality and the unreasonableness of its use of the memoirs. The majority believes that this passage is an insubstantial use of the memoirs that gives the rest of the article credibility. I believe that it is blatant infringement, a direct appropriation of some of the most vivid parts of the book.

Based on *The Nation*'s use of no source other than "A Time To Heal" to write its article and on its use of the exact language in the book in many places, I can only conclude that *The Nation* has used far more of the memoirs than was necessary to write a "news" article. I believe that this conclusion is mandated irrespective of whether the material in the memoirs "concerns matter of great public import." *Cf. Iowa State University Research Foundation, Inc.* v. *American Broadcasting Companies, Inc.*, 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.") We recently rejected the fair use defense when we accepted the trial court's finding that the amount of the original work used was "so substantial as to be unfairly excessive." *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 185 (2d Cir. 1981). *Cf. Berlin* v. *E.C. Publications, Inc.*, 329 F.2d at 544 (parody does not constitute fair use if borrowed from original "to a far greater degree than that required if the parody is to 'recall or conjure up' that original"). The majority should follow *MCA* and reject the fair use defense in this case.

Furthermore, the fair use defense is negated by the effect of the *Nation* article on the market for the memoirs and for the serialization that *The Nation* knew had been

licensed to *Time* magazine. Unlike the majority, I believe that this case involves the "chiseling for personal profit" that we found in *Wainwright*. 558 F.2d at 97. *The Nation* is a for-profit magazine trying to sell copies and bolster its own prestige. The publisher hoped that the article would sell newsstand copies and generate renewal subscriptions. Although *The Nation*'s newsstand profit was small, it was still profit. The degree of success is irrelevant. The abstract of the *Wainwright* reports by itself probably did not make a great profit for the *Wall Street Transcript* either. *Cf. Iowa State University Research Foundation, Inc.*, 621 F.2d at 61 (that use is for "commercial exploitation" is relevant to, though not determinative of, fair use question) (citing *Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978)).

Fair use will generally not be found if there has been a substantial incursion into the market for the primary work. *See, e.g., Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F.Supp. 686, 689 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974). It is evident that *The Nation* knowingly invaded the market for the *Time* serialization. Some who read the *Nation* article probably refrained from buying the memoirs or the properly licensed *Time* serialization. *Time* cancelled the second payment to Harper & Row because of the *Nation* article. Irrespective of its stated purpose, *The Nation* knew that it was fulfilling the demand for the *Time* excerpts. *The Nation* thus printed rewritten portions of the copyrighted Ford memoirs without paying for the privilege. *Cf. DC Comics Inc.* v. *Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (denying fair use defense even though district court found no harm resulted from use defendant did not pay for on ground that licensing for a fee is a benefit of owning a copyright). Fair use should not be found here.

The majority is correct in suggesting that the fair use doctrine is used to reconcile competing claims of freedom of the press and ownership of intellectual labor. But the result reached by Judge Owen does not "threaten press freedom or obstruct the citizens' access to vital facts and historical observations about the nation's life." The publication of the book itself and the other authorized uses of the copyrighted material would satisfy that need. An affirmance would only chill chiseling for personal profit. I would affirm.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and

THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION

ASSOCIATES, INC.,

Defendants

----------X

OPINION AND ORDER
80 Civ. 0856 (RO)

OWEN, District Judge

Defendants Nation Enterprises and The Nation Associates, Inc. publish The Nation which is perhaps America's oldest continuously published weekly magazine. On a day in late March 1979, an undisclosed "source" put The Nation's editor, Victor Navasky, into unauthorized possession of a draft of former President

Gerald R. Ford's memoirs. This draft was the fruit of close to two years work by Ford and his assistant Trevor Armbrister, a senior editor of Readers Digest and himself an author of books.[1] Navasky knew the memoirs were to be published shortly in book form by plaintiffs Harper & Row, Publishers, Inc and The Readers Digest Association, Inc. with certain prepublication rights in Time magazine. However, believing that the draft contained "a real hot news story"[2] concerning Ford's pardon of former President Nixon, as well as lesser news, Navasky spent overnight or perhaps the next twenty-four hour period quoting and paraphrasing from a number of sections of the memoirs. Navasky added no comment of his own. He did not check the material. As he later testified, "I wasn't reporting on the truth or falsity of the

account; I was reporting the fact that Ford reported this. ..." Part of Navasky's rush apparently was caused by the fact that he had to get the draft back to his "source" with some speed.

The Nation article, which appeared on the newstands on April 3, 1979, is somewhat over two thousand words in length, and is set forth hereafter as Appendix A. The major part, as can be seen, details Ford's recital of the events of the pardon of former President Nixon beginning with the time General Alexander Haig, then President Nixon's White House chief of staff, first mentioned a pardon as an option in connection with a resignation, and ending long after the granting of the pardon when President Ford, out of compassion, went to visit the desperately ill ex-President Nixon.

The Nation article also repeats vignettes about Henry Kissinger, John Connally and David Kennerly, a White House photographer. It includes Ford's Presidential reminiscences of Nelson Rockefeller, Ronald Reagan, and Edward Bennett Williams and his recital of the circumstances surrounding his decision to run again for the Presidency. The Nation article closes by relating in some detail Ford's observations of Nixon's character.

The memoirs were shortly thereafter published under the title "A Time to Heal" and were, at the time of The Nation article, protected by copyright.[3] Editor Navasky knew this. The article was therefore an infringement of that copyright, unless otherwise privileged.

The Nation endeavors to justify its use of the material under the "fair use" doctrine[4] on the theory that the content

of the Ford memoirs was "news"[5] - indeed, that aspects of the Nixon pardon were "hot news."

The doctrine of fair use, which emerged through the common law is now codified in the Copyright Act of 1976, 17 U.S.C. § 107. The statute reads:

> Notwithstanding the provisions of Section 106, [17 U.S.C. § 106,] the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose or character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Under these guidelines, the inquiry, as I perceive it, is whether The Nation's article was "news reporting", and if so, was a "fair use" of the materials taken.

Even were I to accept defendants' broadest statement of what was "news" in the Nation article, that news would be no more extensive than the following:

MR. NAVASKY: The news, in my judgment, was that President Ford had had a conversation with Alexander Haig that was possibly an impropriety at the highest level of our government because it suggested there was possibly an obstruction of justice[6] in the transaction and in the story, and what was particularly newsworthy, having said that, was that in the book there were documents that Ford quoted from that, as far as I was aware of at the time - I have since discovered that they are in the Congressional Record - were being published for the first time that confirmed his account.

* * *

In addition, the thing that was so striking to me was the written statement that Ford read to Alexander Haig after

his conversations with his aides, saying that he has no intention of recommending what the President should do about resigning or not resigning after they had had a conversation the previous day on that matter.[7] Navasky deposition at 37-9.

At no time did Navasky believe that the rest of the memoirs contained "hot news".[7] Moreover, he was aware that once the book was published there would be no news value in any of the material.[8]

More importantly, it is now conceded even by defendants that the "hot news" revealed in the article was not the revelation that Navasky believed it was when he testified on his deposition. What Navasky on that March day in 1979 thought was "hot news" about the pardon in the Ford memoirs had in fact been the subject of detailed testimony by President Ford in an unusual personal appearance before a Congressional Committee in 1974 which, needless to say,

had been blazoned by the press.[9] Given the foregoing, I conclude that the "revelations" of the Ford memoirs were not such news, "hot" or otherwise, as to permit the use of author Ford's copyrighted material.

Assessing the "fair use" factors, I conclude here, too, that none of them provide The Nation with the absolution it seeks. First, the article was published for profit. Second, the infringed work was soon-to-be-published. Third, The Nation took what was essentially the heart of the book,[10] and fourth, the effect of The Nation's extensive use of the Nixon pardon material caused the Time agreement to be aborted and thus diminished the value of the copyright.[11]

As was stated so simply and effectively by Justice Story in Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass.

1841)(No. 4901), in a case involving one Jared Sparks who published in book form certain official and other papers of George Washington:

> [N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.
> 9 F.Cas. at 344-45.

Upon the failure of their fair use defense, defendants are left with one final contention. The Nation asserts that three categories of materials in the Ford memoirs are not copyrightable: (1) the recitals of historical facts, (2) the texts of government memoranda prepared by individuals other than Ford, and (3) the quoted conversations of persons other than Ford. The Nation

contends now that given the non-copyrightability of these materials, its taking of copyrightable material was of such modest compass as to be excusable under the law.

Without question, defendants are correct in their assertion that the historical facts and the memoranda prepared by others are not per se copyrightable by President Ford. However, these facts and memoranda were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that

made them of value to The Nation. Correspondingly, it is this same totality that is protected by the copyright laws.

This principle governs the portions of Ford's memoirs reciting the statements of individuals other than Ford as well. I decline to enter the thicket of deciding which statements were exact quotations - and therefore not protected by copyright[12] -- and which were merely reconstructions of statements pieced together by Ford -- and therefore copyrightable.[13] I suspect that most were to some degree reconstructions. Suffice it to say that, simply viewed, I regard the historical facts, memoranda, and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence.

Finally, plaintiffs request an award of their attorney's fees incurred in prosecuting this action. While this might be an appropriate situation for the award of fees, I am constrained by statute to disallow the application.[14] Under the Copyright Law, set forth in the footnote, an award of fees is not available where memoirs, which have not yet been published, have been copied. I note from the legislative history of § 412 that Congress sought to induce authors to register works for copyright -- and thus made them available to the public at large -- by making the remedy of attorney's fees available to one who has published and registered for copyright and, on the other hand, denying it to one who has not. Congress, in §412(2), did envision - and provide for - the unusual situation where "newsworthy

or suddenly popular works may be infringed almost as soon as they are published, before the copyright owner has had a reasonable opportunity to register his claim." Notes of Committee on the Judiciary, House Report No. 94-1476. Congress did not, however, apparently envision the even more unusual situation where an author, who is about to publish and register, has had a draft wrongfully copied. I believe the statute's denial of the remedy of fees to an author or his assigns in such a situation was an oversight in view of the legislative purpose underlying §412. However, the statute is unambiguous and consideration of an award of attorney's fees in this situation is foreclosed.

Given the foregoing, I conclude that The Nation has infringed the plaintiffs' copyright without justification. The

plaintiffs are awarded the $12,500 they were damaged by Time's non-performance, and such further amounts as may be found to be profits in an accounting before a Magistrate of this Court who shall hear and report thereon. Plaintiffs are awarded costs and disbursements. Attorney's fees are denied. In addition to the foregoing findings of fact and conclusions of law, the plaintiffs' heretofore-submitted detailed findings and conclusions are herewith signed.

So ordered.

Dated: February 16, 1983
New York, New York
/s/ Richard Owen
United States District Judge

FOOTNOTES

1 The preparation involved not only consideration of a "mountain" of documents, but interviews with numerous third-parties. The Ford-Armbrister dialogues and third-party interviews, transcribed from tape recordings, ran over 6,000 pages.

2 Navasky deposition at 36.

3 There is no dispute that this is a literary work, 17 U.S.C. §102(a)(1), and that the publishing agreement between Ford and plaintiffs was appropriately recorded, 17 U.S.C. §205(d).

4 The Nation further urges that it was justified in publishing the article notwithstanding copyright, by reason of certain rights under the First

Amendment. While there may be a circumstance in which the First Amendment provides a defendant with greater protection than the fair use doctrine, this is not, in my judgment, one of them. Thus my inquiry is limited solely to the applicability of the doctrine of fair use. Roy Export Co. v. Columbia Broadcasting System, Inc., 672 F.2d 1095, 1099 - 1100(2d Cir. 1982).

5 In this regard Navasky, subsequent to the publication of the article, acknowledged that he had been mistaken as to the "news" aspect of this information. This mistake was caused by his failure to ascertain all that had been revealed in the Congressional hearings in 1974. It is obviously no excuse for a copyright violation that an editor does not remember that something

has been front page headlines. I also note that, according to one of The Nation's own witnesses, a failure to check is poor journalism. Cf., Time, Inc. v. Firestone, 424 U.S. 448(1976)(wherein the Supreme Court in a defamation action held a publisher to a duty of due care in checking the factual accuracy of certain statements made about a private figure.)

6 This theory, as Navasky acknowledged on the trial, was sheer speculation. The colloquy went as follows:

> THE COURT: But the fact that was revealed in 1974 was that he had the conversation with Haig, and Haig left without getting any response. That's where you say you saw the potentiality of an obstruction of justice.

MR. NAVASKY: That's correct...

THE COURT: That, too, is an undisputed fact. The only question that is open is in the meantime whether or not he, on his own, or he, at the suggestion of some aide came to the view that the phone call to Haig should be made.

Now, I am saying to you what difference does it make whether on his own he came to that view or whether some aide called it to his attention and said, "Mr. Vice-President, you better disavow this because the implications are ones that are troublesome."

What's the difference?

MR. NAVASKY: . . .I think the difference is that there is a third possibility which you haven't mentioned.... There is the

possibility that this second conversation, after talking to his aides, was made for the record pro forma so that he could say he put in that there was no deal when in fact there may have been a third phone call to General Haig, which none of us know about, or a private conversation with General Haig saying for the record I am going to read you this statement but you go ahead and proceed as planned.

Now, I raise that third possibility, and I did not raise it in the article because it's remote enough so I didn't feel comfortable. I did not have a chance to go back to the record -

THE COURT: And you have no evidence?

MR. NAVASKY: I have no

evidence, except I have the statements of these three aides which to me - I was as troubled by them as they were troubled by Ford's silence -- and to me that is appropriate news in the politics of 1979, because you have two candidates for the Presidency of the United States who might have been involved in a deal, and you, your Honor, don't accept this as proof that they are involved in a deal, I don't invoke it as proof that they were involved in a deal, but I do see it as raising the possibility that they were in a newsworthy enough context that I reported it.

THE COURT: Can I ask you whether it occurred to you that equally with your theory it was entirely possible that Ford was

thunderstruck at what Haig said to him and was frankly just sitting there listening, taking it in?

MR. NAVASKY: Your Honor, it did --

THE COURT: And after Haig had walked out he then began to assess the pieces and put them together. Is that entirely possible?

MR. NAVASKY: That is entirely possible. Trial transcript at 508-12

7 Navasky deposition at 83-4.

8 Navasky deposition at 48-9.

9 At the trial, Navasky asserted that the "hot news" in his article was (1) that an aide of Ford pointed out to him the risk of not responding to Haig's "pardon option" and (2) that Ford's

subsequent response to Haig over the telephone was read from a written statement. It had become clear by this time that what he had believed in March, 1979 was "hot news" was not. The following is illuminative.

> THE COURT:...Starting with your deposition, you are asked, I take it, why in writing the story you say that the account of the Nixon pardon contains significant new detail which obviously made it newsworthy, right?
>
> MR. NAVASKY: That's right.
>
> THE COURT: At your deposition, at pages 86 and 87, you are asked what was the new detail. You recite that the new detail is: one, the Ruth memorandum; two, the statement Ford read over the phone to Haig; and three, the fact he hadn't told

Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had the original discussion.

> Those are the three new details that you said when questioned on April 3, 1981 were those that you regarded as newsworthy. What [plaintiffs' counsel] is saying to you, and I gather you acknowledge, that each of those new details was in fact revealed somewhere: The Ruth memorandum in the Jaworski book; the statement to Haig in the Hungate hearings; and the conversation with Haig earlier, also in the Hungate hearings.
>
> So we are at the point where in fact none of these revelations are in fact new because they have all been revealed somewhere. They were

new, perhaps to you, but they were not new in the journalistic view. Right?

MR. NAVASKY: That is true, your Honor.

Trial Transcript at 488-89.

The Nixon pardon material was the very part for which Time was willing to pay $25,000.

The Nation observes that, notwithstanding the publication of its article, Time was still willing to publish had plaintiffs been willing to let Time advance the date of publication one week. Plaintiffs, however, declined on the ground that it made the interval between the Time publication and the book being available in the stores too long.

As Irwin Gilkes, then with Harper & Row, testified:

> [I]f the period of time between the publicity of the book and the availability of the book is too long, and this is extremely delicate and very much a question of one's judgment and sense of the book itself, if that time is too long, then the public when the book appears in the book stores feels that, well, I know all about this, this is really no reason to spend $13.95 or whatever, to read the book, because there has been so much written about it that all the best parts are things I know about already, and well, there is a sort of psychological set that gets on with whatever has happened since, something newer, since we are always

bombarded with something newer.

Trial Transcript at 142.

This position does not seem to be unreasonable, and I therefore decline to second-guess plaintiffs' business judgment in this regard on the basis of expert testimony to the contrary proferred to me by The Nation.

12 Rokeach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. 155 (S.D.N.Y. 1978).

13 Harris v. Miller, 50 U.S.P.Q. 306(S.D.N.Y. 1951).

14 Pursuant to the Copyright Act of 1976, 17 U.S.C. § 412, "no award of statutory damages or of attorney's fees, as provided to sections 504 and 505, shall be made for -- (1) any infringement

of copyright in an unpublished work commenced before the effective date of its registration....

Plaintiffs have also applied for attorneys' fees on the common law basis set forth in such cases as Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240(1975) and Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 107 (2d Cir. 1977). Although such fees may be awarded in copyright actions where a party has conducted litigation in bad faith, this is not such a case.

Appendix A to District Court Opinion - the Nation Article - is not reproduced here but is reproduced as an appendix to the Court of Appeals opinion, and as a part of Appendix E to this Petition for Certiorari.

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF N.Y.

Appendix C

Appendix C is a retyped version of the District Court's Supplemental Findings of Fact and Conclusions of Law.

The original of this document consists of Plaintiffs' Proposed Findings of Fact and Conclusions of Law, containing the District Court's handwritten notations indicating the adoption by the District Court of certain of the proposed findings and conclusions, and the excision of certain others.

In this appendix, proposed findings and conclusions excised by the District Court have not been reproduced. Excisions of an entire paragraph are indicated by the fact that the paragraph number does not appear. Excisions within a paragraph are indicated by three asterisks.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants.

----------x

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPLEMENTAL TO OPINION OF FEBRUARY 16, 1983

Civil Action No. 80 Civ. 0856 (RO)

THE COURTS SUPPLEMENTAL FINDINGS OF FACT*

Parties

1. Plaintiff Harper & Row is a Delaware corporation with its principal place of business at 10 East 53rd Street,

*The fact certain proposed findings here are excised does not mean that the Court finds that the record does not support them, but merely that the Court regards them as unnecessary in light of the opinion herein, or otherwise.

New York, New York. Plaintiff Reader's Digest is a Delaware corporation with its principal place of business in the Town of New Castle, New York.

2. Defendant Nation Enterprises is a New York limited partnership with its principal place of business at 72 Fifth Avenue, New York, New York. Defendant Nation Associates, Inc., is a New York corporation with its principal place of business at 72 Fifth Avenue, New York, New York. (PTX 27; PTX 33, Navasky Dep. at 7).*

*The following abbreviations are used in these Proposed Findings of Fact and Conclusions of Law:
PTX ___ - Plaintiffs' trial exhibit ____
DTX ___ - Defendants' trial exhibit ____
TR. ___ - Trial Transcript at the page indicated
Dep. at ___ - Deposition transcript at the page indicated

3. Plaintiffs Harper & Row and Reader's Digest are publishers of various books. Reader's Digest is also the publisher of the Reader's Digest magazine. (Armbrister, TR. 14; PTX 3 and 6).

4. Defendant Nation Enterprises is the publisher of the weekly magazine the Nation and defendant Nation Associates, Inc. is the copyright owner of such magazine. (PTX 10, 27; PTX 33, Navasky Dep. at 7).

5. By letters dated December 8, 1980, November 30, 1980 and June 25, 1982, former President Ford, his assistant, Trevor Armbrister, and Time, Inc. respectively, agreed to be bound by the outcome of this litigation (PTX 24, 25 and 26). Former President Ford also agreed that Harper & Row and Reader's Digest would protect his rights and

interests under the publishing agreement. (PTX 25). Defendants have also withdrawn their Third Affirmative Defense which had alleged the necessity under Rule 19 Fed.R.Civ.P. of making former President Ford and Mr. Armbrister parties to this action. (TR. 254).

Preparation of President Fords Memoirs

6. On February 28, 1977, former President Gerald R. Ford entered into a publishing agreement with the two plaintiffs in this action, Harper & Row and Reader's Digest. The contract called upon President Ford to prepare his memoirs and to deliver a manuscript to Harper & Row and Reader's Digest by January 2, 1979. (PTX 6).

7. President Ford granted Harper & Row and Reader's Digest the sole and exclusive right to publish and sell the

memoirs in book form in the English language, and the sole and exclusive right to license subsidiary rights to the memoirs, including the right to publish portions of the memoirs in newspapers or periodicals prior to the publication in book form. (Id., ¶¶ 2 and 10).

Harper & Row and Reader's Digest was duly recorded on November 19, 1979 in the United States Copyright Office in compliance with Section 205(d) of the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., Pub. L. No. 94-553 (the "Copyright Act"). (PTX 6 and 7).

9. President Ford hired Trevor Armbrister to assist him in preparation of the memoirs. By the terms of Armbrister's employment, President Ford was to be the sole owner of the copyright and literary rights, as well as of all materials resulting from the process of

writing the book. (PTX 17, May 10, 1977 agreement between President Ford and Trevor Armbrister; Armbrister, TR. 24). The work started shortly after the date of the publishing agreement and continued unabated for approximately a two year period. (Armbrister, TR. 18; Proposed Findings ¶¶ 10-20). Both President Ford and Trevor Armbrister spent extensive time in this effort.

10. When Trevor Armbrister met President Ford, he advised that the memoirs be as informal as possible and should rely not on documents but on conversations. (Armbrister, TR. 19, 22). Mr. Armbrister felt the memoirs should be very human and should reflect as best as possible the human side of President Ford's administration. (Id. at 22). Those suggestions were accepted by President Ford and were reflected in the

procedures described below which were followed in the preparation of the book.

11. President Ford himself had interviews with Trevor Armbrister on more than 200 occasions between April 1977 and February 1978. (Armbrister, TR. 25-31; PTX 14, Ford Dept. at 28). These interviews took place in April and May 1977, in the summer of 1977, in September 1977 and then again from November 1977 through January 1978. (Armbrister, TR. 25-31).

12. All of the interviews were taped and transcribed, resulting in 3,600 typed pages, legal size, of transcript. (Armbrister, TR. 29).

13. The time spent in preparing for these interviews was also extensive. Prior to the first interview, Trevor Armbrister spent two to three weeks going through the files at Reader's Digest

collecting and photocopying a mountain of material: every article from the Reader's Digest files about President Ford and his Presidency. (Armbrister, TR. 24-25).

14. During the interviewing process, Trevor Armbrister and President Ford generally met seven days a week. For each two to three hours spent in interviewing, Trevor Armbrister spent an additional five to eight hours preparing for interviews. (Armbrister, TR. 26). President Ford prepared for the interviews by drafting word portraits of major figures and preparing essays. (Armbrister, TR. 33-34). The word portraits included every living statesman and most members of Congress. (Id.) For example, President Ford spent considerable time delineating his perception of President Nixon's character. (Id. at 57). This portrait

was among the sections subsequently copied from the then-unpublished manuscript by the Nation. (Armbrister, TR. 119-20).

15. The factual research for the preparation of the book also included extensive interviews by Trevor Armbrister with numerous other people who were involved in one way or the other in the events covered in President Ford's memoirs. This included interviews with Alexander Haig, Nelson Rockefeller, Henry Kissinger, President Ford's aides, and others. (Armbrister, TR. 29). These interviews were also taped and transcribed and resulted in 2,600 typed pages of transcript, legal size. (Id.).

16. After completing the interviews, Trevor Armbrister visited the Ford Library in Ann Arbor, Michigan (Armbrister, TR. 29-30) to see if there

were any documents relating to the President's accession to office in August 1974. Trevor Armbrister was looking, among other things, for any material related to the pardon, but did not find any such documents. (Armbrister, TR. 30; PTX 16, at 3). In addition, Armbrister ascertained that Ford had not kept a diary of his days in office. (Armbrister, TR. 35).

17. Trevor Armbrister began preparing the manuscript in May 1978, and completed the first draft in February 1979. (Armbrister, TR. 37, 42).

18. The initial draft prepared by Trevor Armbrister was edited by Reader's Digest personnel in Washington and New York and a retyped version was then sent to President Ford. (Armbrister, TR. 41).

19. President Ford reviewed the manuscript and his comments were

incorporated in a new typescript version. (Armbrister, TR. 44). Three additional editing sessions occurred involving President Ford, Trevor Armbrister as well as others. These sessions included a complete word-for-word review of the new typescript, an additional word-for-word review of the galleys, and still another word-for-word review of the page proofs. (Armbrister, TR. 43-46). President Ford went over each draft of the manuscript personally, and made many changes in each draft. (PTX 14, Ford Dep. at 55). President Ford's changes in the galleys in March 1979 were so extensive that one of the editors described it as a "rewriting," and commented that "[e]ntire sections have been either reworded, changed, deleted or simply added to." (PTX 38, 39; Glikes, TR. 163-68).

20. As Trevor Armbrister testified, his role, as editor, was to draw from President Ford his memory, experiences and perspective on events. (Armbrister, TR. 125). The author and his assistant intended that by interviewing President Ford, Mr. Armbrister was, in effect, getting the former president's words on paper. (Id. at 123). Using President Ford's actual words as much as possible, Trevor Armbrister's next task was to arrange his words in an order and such a manner that an effective book would flow from that. (Armbrister, TR. 39, 123). President Ford then reviewed the manuscript and edited it so that ultimately he could say that these were his words and this was his autobiography. (Armbrister, TR. 124-25). President Ford was the final judge of what was to be included in his memoirs, and regarded

them, in all respects, as the product of his own efforts, his own supervision, and his own knowledge of the facts involved (PTX 14, Ford Dep. at 55,28).

The Publishing Agreement with Harper & Row and Reader's Digest

21. An exhibit to the publishing agreement stated that the major portion of the memoirs would "describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and

(3) Mr. Ford's reflections on this period of history, and the morality and personalities involved." (Exhibit A to PTX 6).

22. In the contract, President Ford also acknowledged that "the value of the rights granted to Publisher hereunder would be substantially diminished by Author's public discussion of the unique information not previously disclosed about Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the work hereunder. Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision." (PTX

6, ¶ 20(b)). President Ford, in fact, during interviews and speeches, responded to press and audience questions about the pardon. (PTX 14, Ford Dep. at 16).

23. While in office, President Ford had testified concerning the pardon before a Subcommittee of the House Committee on the Judiciary under Congressman Hungate. (PTX 14, Ford Dep. at 16; PTX 15; 49; 50). President Ford understood that the above plan for maximizing the appeal of his book meant that the additional information he had agreed not to disclose until book publication was his subjective feelings and his personal discussions with his wife and others. (PTX 14, Ford Dep. at 17). Essentially the book added the more intimate, the more personal, the more subjective feelings that went through President Ford's mind from the time that

the pardon became a possibility. (Id. at 18). The process involved in "the writing of the book", and the "thoughtful preparation" this entailed, enabled Mr. Ford to bring forth these more intimate aspects of his experiences. (Id. at 59; 60).

24. Harper & Row also understood that the book would not contain sensational revelations, that it was going to be the President's memoirs of his thoughts and feelings of the events he participated in, and that it was the President's words and interpretation of the events that was likely to be unique. (Glikes, TR. 173).

The License Agreement with Time, Inc.

26. By mid-March 1979, work on the memoirs was nearing its completion. The manuscript was in galleys at the time. (PTX 38). Bound books would be ready for

shipment on April 24 or 25. (Glikes, TR. 144).

27. On March 14, 1979, Harper & Row and Reader's Digest entered into an agreement with Time, Inc. granting Time the right to publish excerpts, not to exceed 7,500 words, from Chapters 1 and 3 of President Ford's memoirs, dealing with Nixon's resignation and pardon. (PTX 9). The contract provided that the excerpts would appear in the issue of Time dated April 23, which was scheduled to go on sale at newsstands on April 16. (PTX 9; Glikes, TR. 136-37). The contract also included an amendment requiring that Time submit its proposed article to the publishers seven days before the issue was to go on sale. (PTX 9, amendment of March 28, 1979, ¶ 2(a)).

28. The contract provided for a total payment of $25,000, of which

$12,500 was payable upon signing and $12,500 was payable upon the publication of the excerpts. (PTX 9).

29. The contract also provided that the rights granted to Time were exclusive, that each party would make reasonable efforts to keep the contents of Chapter 1 and 3 secure, but that any publication of material from Chapters 1 and 3 prior to or simultaneous with publication by Time would require Harper & Row and Reader's Digest, upon Time's request, to renegotiate in good faith the second payment. (PTX 9). Maintaining exclusivity of the manuscript was a foremost consideration in the view of Time. (PTX 40, Cave Dep. at 14).

30. Plaintiffs undertook to keep the manuscript confidential. Plaintiff Harper & Row's subsidiary rights department required all those to whom the

manuscript was shown to sign an agreement to keep the manuscript confidential. (Glikes, TR. 162-63).

Copyright Office Registrations

31. Copyright registration for the unpublished manuscript of "A Time to Heal" was obtained in the name of Gerald R. Ford from the United States Register of Copyright on August 24, 1979 (PTX 2, Certificate Nos. TXU 26-776 and CA TXU 42-204).

32. Copyright registration for the hardcover book "A Time to Heal" was obtained in the name of Gerald R. Ford on August 24, 1979. (PTX 4, Certificate No. TX 306-737).

The Nation Publication

33. Towards the end of March 1979 Mr. Navasky, the Editor of the Nation Magazine, published by the defendants in this action, received a copy of the

typescript of President Ford's memoirs. (Navasky, TR. 435-36). Mr. Navasky understood at that time that the person who gave him the copy was not authorized to give it to him. (Id. at 437). He also knew it was a "rare event" to receive a manuscript without the author's or publisher's permission. (Id. at 473).

34. Working over a weekend, Mr. Navasky decided to rush into print with an article based upon the memoirs. Mr. Navasky spent about 6 to 10 hours reading the manuscript and another 6 to 10 hours writing the article. (Navasky, TR. 439-40). The article, appearing in the issue dated April 7, 1979, apparently reached the newsstands on April 3, 1979 and came to the attention of Time and Harper & Row on that date. (Glikes, TR. 137-38; PTX 31A and 31B).

36. The article was derived almost exclusively from the memoirs. The only contributions by Mr. Navasky were the inclusion of some information concerning the publication schedule of the book and of the Time excerpts, a few transition sentences, and three concluding paragraphs in which Mr. Navasky stated that the May 5, 1979 issue of the Nation would deal with the "ethical problems" raised by his publication. At his deposition, Mr. Navasky aptly characterized his contribution as "invisible." (PTX 33, Navasky Dep. at 125).

The Effect of the Publication of the Nation Article

38. As a direct result of the publication in the Nation, Harper & Row and Reader's Digest lost the benefit of the contract with Time, Inc.: (1) the

excerpts from Chapters 1 and 3 did not appear in the April 23 issue of Time as had been agreed, and (2) Harper & Row and Reader's Digest did not receive the second payment of $12,500 which they would otherwise have been entitled to receive pursuant to the contract. (Glikes, TR. 151-52).

41. The position of Harper & Row and Reader's Digest on refusing to advance the publication date was a reasonable exercise of business judgment and consistent with the position that they had taken with Time a month earlier. At that point, Time had also asked to run the excerpts one week early, and Harper & Row had refused to give permission to such advance publication. This decision was made before the appearance of the Nation article. (Glikes, TR. 156; PTX 35; Seaver, TR. 321).

42. Since Harper & Row and Reader's Digest were unwilling to allow publication by Time earlier than the agreed upon date, Time decided not to publish at all and refused to renegotiate or to make the final payment of $12,500 called for by the contract. (Glikes, TR. 151-52; PTX 40, Cave Dep. at 20-22, 34-35; PTX 31B).

43. Shipments of the book "A Time to Heal" commenced on April 24 or April 25, 1979. (Glikes, TR. 144, 184, 205). The official publication date was June 6, 1979. (PTX 4).

Certain Fair Use Considerations

44. The article in the Nation asserted that President Ford's 1979 account of the Nixon pardon contained "significant new detail" on the negotiations and considerations that surrounded the pardon, and implied that

one of those significant new details was a conversation, before Ford became president, between President Ford and Alexander Haig at which the idea of a pardon for Nixon was raised. (PTX 10, 21). Actually, however, President Ford's meeting with Haig and the inclusion in their discussions of Haig's reference to the possibility of a pardon for former President Nixon should Ford become President, were not new details but had been disclosed in President Ford's 1974 Hungate testimony. (PTX 15, at 342-43, 344). Mr. Navasky has conceded that the Haig conversation was not news in the sense that it was on the record before. (Navasky, TR. 488-89; 504; 512).

45. The story of President Ford's discussion with Alexander Haig was covered extensively, both in the press and in books concerning Watergate. The

New York Times of October 18, 1974 featured a banner headline dealing with President Ford's testimony before the Hungate Subcommittee. Alexander Haig's reference to a pardon was covered on the first page of that story. (PTX 49). Similarly, the Washington Post gave prominent coverage to President Ford's Hungate testimony and described the conversation with Alexander Haig on the front page. (PTX 50). The details of these conversations were also covered in full in the best selling 1976 book by Woodward and Bernstein, The Final Days (PTX 57), in the 1976 book by J. Anthony Lukas, Nightmare (PTX 58), which Mr. Navasky considered to be the authoritative book on Watergate (Navasky, TR. 440), and in the 1975 book on the first one hundred days of the Ford presidency, A Ford Not A Lincoln, written

by Mr. Reaves, an expert witness called by the Nation in this case. In addition, the November 9, 1974 issue of the Nation (PTX 52), had included an article covering and criticizing the Hungate testimony.

46. Prior to publishing the article, Mr. Navasky made no investigation whatsoever to determine the extent to which President Ford's story about the Nixon pardon was new, or the extent to which it had already been disclosed in the public record or the press. He did not look at the Hungate testimony. (Navasky, TR. 440).***

54. Mr. Navasky's expressed desire to beat out the competition (TR. 466-67) and to "make news" (TR. 467-68) and create a "news event" (TR. 536) so as to get additional coverage for his magazine through the wire services (TR. 452-53;

456) refers to benefits Mr. Navasky was seeking for the Nation and not to any necessity for publication of excerpts in advance of publication authorized by the copyright owner.

57. A major purpose in publishing the article was to advance the commercial interest of the Nation magazine.***

66. The publication by the Nation had the clearly foreseeable effect of destroying plaintiffs' ability to grant exclusive first serialization rights to Time and depriving Harper & Row and Reader's Digest of the benefit of their contract with Time magazine.

67. The Nation knew of the plaintiffs' contract with Time permitting advance excerpts from the book to be published in Time magazine and wanted to "scoop" the former president and Time in

publishing excerpts from Ford's accounts of Nixon's resignation and the pardon. The Nation also knew that the book's print order and sales depended upon public reception to the Time excerpts (PTX 10, 21 and 22, Nation April 7, 1979 article and later editorials). At trial, the Nation's editor, Mr. Navasky, also testified that it occurred to him at the time he had access to Ford's unpublished manuscript, that the same portions that the Nation copied would be of interest to Time magazine. (TR. 476).

CONCLUSIONS OF LAW

1. This is an action arising under the copyright laws of the United States, 17 U.S.C. §§101 et seq. The Court, therefore, has exclusive jurisdiction of this action under 28 U.S.C. §1338(a).

2. Plaintiffs are the copyright owners of the exclusive literary rights

in the unpublished manuscript of the memoirs of former President Ford, an original literary work within the meaning of Sections 102(a)(1) and 101 of the Copyright Act.

3. Plaintiffs' exclusive rights in the unpublished manuscript were infringed by the defendants in their publication in the April 7, 1979 issue of the Nation magazine of an article entitled "Behind the Nixon Pardon" (the "Nation article").

4. Three separate exclusive rights were infringed by the Nation article: (i) the right to produce the copyrighted work in copies, (ii) the right to license the preparation of derivative works based upon the copyrighted work, and (iii) the right of first distribution of copies of the copyrighted work to the public (Section 106 (1), (2) and (3) of the Copyright Act).

5. Defendants' access to the unpublished manuscript and actual copying are admitted (PTX 1a, 18, 19, 200; PTX 33, Navasky Dep. at 30-33). In addition, plaintiffs have shown by clear and convincing evidence substantial similarity of copyrightable expression between the unpublished manuscript and the Nation article.

6. Defendants have failed to establish a fair use defense. ***

(a) Nature and Purpose of Defendants' Use

(i) The Nation article did not constitute sufficiently legitimate news reporting to warrant disregard of author's protection. Wainright Sec. Inc. v. Wall Street Transcript Corp., 558 F. 2d 91, 95-96 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978). ***

(b) Nature of the Copyrighted Work

The copyrighted work is an unpublished, autobiographical manuscript, entitled to copyright protection. The fair use defense is narrowed when the work is unpublished.

(c) Substantiality of Defendants' Taking

(i) The Nation article appropriated copyrightable expression far in excess of what was necessary to satisfy any conceivably legitimate news reporting purpose.

(ii) The amount taken by the Nation was qualitatively substantial with respect to the manuscript, and constituted virtually the whole of the Nation article.

(d) Market Impact

The Nation's publication had a clear adverse impact on the market for

the work, including first serialization rights.

SO ORDERED
/s/ Richard Owen
United States District Judge

February 16, 1983

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York on the 4th day of January one thousand nine hundred and eighty-four.

HARPER & ROW, PUBLISHERS, INC., and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants-Appellants-Cross-Appellees.

Nos. 83-7277,83-7327

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees-cross-appellants, Harper & Row, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is denied, Judge Meskill dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX E

COMPARISON OF THE TEXT OF THE NATION ARTICLE "BEHIND THE NIXON PARDON" AND PORTIONS OF THE UNPUBLISHED MANUSCRIPT OF "A TIME TO HEAL" BY PRESIDENT GERALD FORD

Appendix E is a typeset version of Plaintiff's Exhibit 11, received in evidence during the trial.

On the left-hand side of the following pages is the complete text of the Nation Article.

On the right-hand side are portions of the unpublished manuscript of President Ford. The original of this exhibit reproduces the actual manuscript pages, or portions thereof, which include corrections, words crossed out, insertions and the like. These are not relevant to the issues in the case and have not been reproduced in the typeset version. The numbers in parentheses (referring to manuscript pages), the asterisks (indicating deletions) and the yellowing are reproduced as they appear in the exhibit.

The Nation
April 7, 1979
Complete Text of "Behind the Nixon Pardon"
[LEFT SIDE OF FOLLOWING PAGES]

THE FORD MEMOIRS

BEHIND THE NIXON PARDON

In his memoirs, *A Time to Heal*, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

[RIGHT SIDE OF FOLLOWING PAGES]

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EDITOR'S NOTE

PAGES E-4 through E-41 WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The Nation Article

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate.

that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency.

that Nixon was the one who first proposed Nelson Rockefeller for Vice President,

and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention.

The Ford Manuscript

Later I was told that just before my arrival at the Californian's hotel, of of his closest advisers, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate. Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. **Had I been aware of the Dart-Reagan conversation, would I have chosen him?** I can't say for sure — I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's Policies — **but I certainly would have considered him.**

• • •

Washington attorney Edward Bennett Williams was my first choice. He was a brilliant lawyer, a savvy Washingtonian with an interest in intelligence matters and a Democrat, which meant that he'd probably win Senate confirmation easily. (401)

• • •

Then we talked about who my Vice President would be. **He suggested that Nelson A. Rockefeller, the four-term governor of New York, would be a wise selection.** (44)

• • •

Inwardly, **I was angry with myself for showing cowardice in not saying to the ultra-conservatives, "It's going to be Ford and Rockefeller,** whatever the consequences." (496)

The Nation Article

Ford also describes his often prickly relations with Henry Kissinger.

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in *Time* in mid-April and in *The Reader's Digest* thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, **the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.**

The Ford Manuscript

Shortly before 9 o'clock on the warm, cloudy morning of August 1, 1974, I received a telephone call from General Alexander M. Haig, Jr. (1)

• • •

The new tapes, he said, contained evidence that would contradict Nixon's version of events in the Watergate scandal. The evidence would prove that Nixon knew about the cover-up six days after the break-in at the Democratic National Committee headquarters and that he'd been deceiving the American people ever since. He hadn't seen the evidence himself, Haig said, but he'd been told about it by people who had. They had explained that **it contained the so-called smoking gun,** and he felt sure that they were telling the truth. (2-3)

• • •

Now he came to the point: "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time?" (4)

The Nation Article

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

He could "ride it out" or he could resign, Haig said.

He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him.

The Ford Manuscript

The hurt was very deep, and I wasn't sure that I could adequately express it in words to anyone, least of all to Nixon himself. (8)

* * *

Repeatedly over the past several months, Nixon had assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view. He had said much the same thing to his Cabinet and staff, to his family and to the American people. I had chosen to believe him, and I had tried to give him the benefit of every doubt. (7)

* * *

Carefully, Haig laid out the options that the "knowledgeable people" on the White House staff had agreed were still available to the President. The first was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. His second option was to resign.

Here the number of alternatives increased. Under provisions of the 25th Amendment to the Constitution, he could step aside temporarily. He could delay his resignation until further along in the impeachment process. He could try to settle for a censure vote in the Congress. He could pardon himself and everyone else involved in Watergate and then resign. Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President — Gerald Ford — would pardon him. (4-5)

The Nation Article

Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon.

The Ford Manuscript

I had no doubts about his basic assumptions. (5)

• • •

I didn't think it would be proper for me to make any recommendations at all, and I told him so. Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power.

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual." (5-6)

• • •

And he mentioned the pardon option, and you sat there listening to him. Well, silence implies assent. He probably went back to the White House and told Nixon that he'd mentioned the idea and that you weren't uncomfortable with it. It was extremely improper for him to bring the subject up." (8)

• • •

Shortly after 8 o'clock the next morning, I met with James St. Clair, the Boston attorney who had been handling Nixon's impeachment defense for the past seven months. (14)

• • •

Then I told him about the options that Haig had mentioned to me the afternoon before. St. Clair listened quietly, commenting only that he had not been the source of any White House staff opinion about a President's power to issue pardons. (15)

The Nation Article

Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

The Ford Manuscript

No sooner had St. Clair left than I called in Marsh. I briefed Jack on everything that had occurred in the past 24 hours. He seemed just as stunned by the news as I had been. That is not to say that he registered much emotion. Anyone who can make 38 parachute jumps while serving as a Congressman has to be fairly calm and unflappable. And Jack was certainly that. But he was also a man of incredibly good judgment. He agreed with Bob that the mere mention of the pardon option constituted a potential time bomb for me. (16)

* * *

The question then became: To whom could I turn? Almost instantly, Bryce Harlow came to mind. A short, solemn-faced Oklahoman who had already served six Presidents, he was a man of total integrity. (16)

* * *

He came to my office late in the afternoon and with Hartmann present, I told him everything I knew. He listened impassively, his expression betraying no emotion at all. Only after I had finished did he let me know in no uncertain terms that he agreed with Bob and Jack, that the mere mention of the pardon option could cause a lot of trouble in the days ahead. (18)

The Nation Article

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

The Ford Manuscript

We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so that there could be no ambiguities. "I want you to understand," I said, "that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make." (19)

• • •

Representative Thad Cochran (who was elected Mississippi's first Republican Senator in 1978) was among the notables who met me as I stepped onto the tarmac and escorted me to a luncheon at the Jackson Hilton Hotel. During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense. Had I said otherwise at that moment, the whole house of cards might have collapsed. (21)

• • •

But compassion for Nixon as an individual hadn't prompted my decision at all. (266)

• • •

All this forced me to address the issue squarely for the first time. I had to get the monkey off my back one way or another. (236)

The Nation Article

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information—i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

"If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined. I think he ought to do it early rather than late."

The Ford Manuscript

For the past several days, Buchen had also been meeting with Jaworski. Their contacts had been facilitated by the fact that both men were staying at the Jefferson Hotel. They could shuttle between floors without attracting undue attention. Jaworski never said so, but it became obvious to Phil that he thought the grand jury would indict Nixon soon. (After all, Phil remembered, the grand jury had named Nixon as an unindicted co-conspirator in the Watergate cover-up several months before.) Then, on the afternoon of September 4, Jaworski gave Phil several crucial pieces of information. (246)

• • •

Shortly after 4 o'clock on the afternon of September 5, Buchen and Becker came into the Oval Office and showed me Jaworski's opinion. It was worrisome. Even if a full year elapsed before a trial could begin, there was no telling how long it would last. And if the verdict was Guilty, one had to assume that Nixon would appeal. That process would take years. Of equal concern to me was a memorandum which the Special Prosecutor had attached. It was from Henry S. Ruth, Jr., Jaworski's deputy, and it listed ten areas of investigation that prosecutors were pursuing. (248)

• • •

Ruth, of course, had given Jaworski his own recommendations: "If you decide to recommend indictment, I think it fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before indictment." He went on to say: "One can make a strong argument for leniency, and if President Ford is so inclined, I think he ought to do it early rather than late." That influenced me because Ruth knew as much about Watergate as anyone. He was simply putting the nation's interests first. Which was precisely what I would have to do. (249)

The Nation Article

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

Buchen, Haig and Henry Kissinger agreed with him, Hartmann was not so sure.

The Ford Manuscript

Months were sure to elapse between an indictment and trial. The entire process would no doubt require years: a minimum of two, a maximum of six. And Nixon would not spend time quietly in San Clemente. He would be fighting for his freedom, taking his cause to the people, and his constant struggle would have dominated the news. The story would overshadow everything else.

No other issue could compete with the drama of a former President trying to stay out of jail. It would be virtually impossible for me to direct public attention on anything else. (238-39)

* * *

Buchen, I knew already, was inclined to favor the idea. Haig was for it too, although he never flatly said as much. He laid out the pros and cons, then stepped back and said, "It's your decision, sir." When I talked to Kissinger at one of our private morning meetings, he said he thought it was the right thing to do. It was the quickest, really the only way to clear the center stage. The spectacle of a former President on trial would damage our country's image internationally. It was a very impressive argument.

However, Hartmann and Marsh had reservations. (239)

The Nation Article

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

The Ford Manuscript

"Look," he said, "if you're going to do this to put Watergate behind you, I think you also ought to let me see how far we can go to get an agreement on the papers and tapes and have that in place at the same time."

"Well," I said, "if you can get the papers and tapes question settled prior to the pardon, that's fine. Let's get it behind us. But I don't want to condition the pardon on his making an agreement on the papers and tapes, and I don't want you to insist on any particular terms." (243)

. . .

After discussing the problem with Miller, Buchen and Becker came up with the concept of a Presidential deed of gift of the papers and tapes to the United States. Under this proposal, the documents would be stored at a federal facility near San Clemente. Nixon and the government would share formal ownership and the materials would be available for court subpoenas for between three and five years. To ensure their security, two keys would be needed to open the vault. Nixon would have one, the General Services Administration the other. (245)

The Nation Article

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

The Ford Manuscript

Then Phil added: "Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that would tell the world, 'Yes, he did it, and he's accepting the pardon because he's guilty.' "

Miller said he understood and volunteered his belief that if the pardon were granted, Nixon should issue a statement admitting his involvement in Watergate. But he wasn't optimistic about getting such a statement. His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent. (246)

The Nation Article

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Let's get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jery Ford pardons him or not." Zeigler proposed a draft,which was turned down on the ground that "*no* statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

The Ford Manuscript

The story Becker told me upon his return to Washington on Saturday was poignant. No sooner had he arrived in San Clemente very late Thursday night than Ron Ziegler had confronted him with an ultimatum. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." (250)

* * *

The discussions in San Clemente then turned to the response Nixon would make if he received a pardon. The first draft that Ziegler prepared for Becker was disastrous. It spoke of the pressures of the office of the President, the necessity for reliance upon the judgment and the honesty of the White House staff and the President's preoccupation with international affairs.

It concluded by acknowledging that Nixon should have delegated less authority to — and placed less reliance on — the members of his staff. That was all. When Ziegler asked Becker what he thought of it, Becker replied that *no* statement would be better than that. (250-51)

* * *

Ziegler went through three more drafts. (251)

* * *

Becker wasn't satisfied. It wasn't the "full confession" he'd been hoping the former President would make, and he suspected that it would fall far short of what I wanted Nixon to say. (252)

The Nation Article

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon — and Watergate — behind us as quickly as possible."

The Ford Manuscript

What Becker wanted to do was to explain the Burdick case of 1915 and restate the White House view that acceptance of a pardon was an acknowledgment of guilt. But Nixon didn't seem to want to talk about that. He must have thought Becker came from Grand Rapids because he was surprised to learn that he lived in Washington. When Becker told him that, the former President asked, "How are the Redskins going to do this year?" (253)

* * *

He opened a desk drawer and pulled out two little boxes containing cuff links and a tie pin. "She got these out of my own jewelry box," Nixon continued. "There aren't any more in the whole world. I want you to have them." (254)

* * *

I especially wanted it understood that my fundamental decision to grant a pardon had nothing to do with any sympathy I might feel for Nixon personally or any concern I might have for the state of his health. Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon — and Watergate — behind us as quickly as possible. (256)

The Nation Article

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death.

The Ford Manuscript

Late in October, Richard Nixon's health took a turn for the worse. The phlebitis in his left leg created blood clots that threatened his life, and doctors decided to operate. After the operation he went into shock, and doctors said his condition was critical. On October 31, I flew to Los Angeles to speak at a dinner for Republican candidates at the Century Plaza Hotel. My staff debated whether or not I ought to visit Nixon at the Long Beach Hospital, only half an hour away. If I made the trip, it would remind everyone of Watergate and the pardon. If I didn't, people would say I lacked compassion. I ended their debate as soon as I found out that it had begun. Of course I would go. (298)

. . .

When I stepped into the room and saw Nixon's condition, I was even more shocked than I had been by door. [sic] He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. (299)

The Nation Article

The manuscript made available to *The Nation* includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

The Ford Manuscript

But that, I knew, would be impossible, for there were still too many things to do. As soon as I returned to the EOB, I telephoned Kissinger. I thought it was urgent to tell him right away how I felt about him. "Henry," I said when he came on the line, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"There will be no problem," he replied in his deep, accented voice. "Sir, it is my job to get along with you and not yours to get along with me."

"We'll get along," I said. "I know we can get along." We talked about the two hats he wore, as Secretary of State and National Security Adviser to the President. "I don't want to make any change," I said. "I think it's worked out well, so let's keep it that way." (46)

The Nation Article

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

The Ford Manuscript

On Saturday afternoon, October 25, I called Kissinger and Rumsfeld into the Oval Office and explained what I wanted to do. The only way I could feel comfortable with my own team in place, I said, was to fire Schlesinger, ask Colby to submit his resignation, bring Bush back as director of the CIA, send Rumsfeld over to Defense, take away one of Kissinger's two hats and upgrade both Cheney and Scowcroft. (494)

* * *

Early in January, in fact, he had come into the Oval Office and handed me a "draft" of his letter of resignation as Secretary of State. His motivation, he explained, was political. Conservatives still blamed him for my dismissal of Schlesinger, although he had had nothing to do with it. (537)

* * *

Nixon came directly to the point. Because of the Agnew tragedy, he said, there was an urgent need to restore public confidence in the office of Vice President. He wanted me to be his nominee. Then as asked if I'd made any political plans. I told him about my promise to Betty and said that I had no ambitions to hold office after January 1977. Just because I'd be serving as Vice President for the remainder of his term didn't mean I'd expect to be the Presidential nominee in 1976.

"Well, that's good," Nixon replied, "because John Connally is my choice for 1976. He'd be excellent."

"That's no problem as far as I'm concerned," I said, and told him about my discussions with Connally in Palm Springs several months before. (155-56)

The Nation Article

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

The Ford Manuscript

At about the same time that I was changing Nelson's future political plans, I was also altering my own. Bearing in mind my promise to Betty that I would retire in January 1977, as well as the statements I'd made during my confirmation hearings on Capitol Hill, I was giving serious thought to announcing once again that I would not be a candidate in 1976. If I did that, I thought, my credibility would be enhanced in both Congress and the country at large, and none of the tough decisions that I had to make could be challenged on political grounds. This very logical scenario dismayed Henry Kissinger. "Mr. President," he said, "You can't do that. It would be disastrous from a foreign policy point of view. For the next 2½ years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President. you've got to hold off on any announcement like that." (216)

The Nation Article

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the *Mayaguez*. At issue was whether airstrikes against the Cambodians were desirable: Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

"Has anyone considered," Kenerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill." Ford decided, "It would be far better to have Navy jets from the *Coral Sea* make surgical strikes against specific targets."

The Ford Manuscript

And this is where Kissinger and I disagreed with Schlesinger. Our first consideration, of course, was the recovery of the ship and her crew. But Henry and I felt that we had to do more. We didn't want the Cambodians to be in a position to reinforce Koh Tang island once our attack began. We wanted them to know that we meant business, so we opted for air strikes against the mainland as well. Schlesinger agreed that our first priority should be to rescue the ship and her crew, but he was far less eager to use *Mayaguez* as an example for Asia and the world. He was concerned that our bombing plans were too extensive. There was a lull in the discussion. Then, from the back of the room, a new voice spoke up. It was Kennerly, who had been taking pictures of us for the past hour or so. Never before during a meeting of this kind had he entered the conversation; I knew he wouldn't have done so now unless what he had to say was important so I listened carefully.

"Has anyone considered," he asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by? (415)

• • •

For several seconds there was silence in the Cabinet Room. (416)

• • •

The decision was up to me. Subjectively, I felt that what Kennerly had said made a lot of sense. Massive airstrikes would constitute overkill. It would be far better to have Navy jets from *Coral Sea* make surgical strikes against specific targets in the vicinity of Kompong Som. (416)

The Nation Article

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

The Ford Manuscript

In Nixon's case, that flaw was pride. A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.) He was very bitter about members of Congress who wanted to cut and run from our obligations in South Vietnam, and he detested those lawmakers who were trying to hamstring his efforts to settle the war from a position of strength. He felt that ever since the days of House Speakers Sam Rayburn and John McCormack and Senate Majority Leader Lyndon Johnson, the Democratic leadership of the Congress had been eroding. Because it had become inherently weak, it was deserving of his contempt. That attitude was reflected in his selection of Bob Haldeman and John Ehrlichman as the White House aides through whom he wanted to deal with the Hill.

It was reflected, too, in his explanations of Watergate. His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. What some journalists called the "dark side" of his personality had prevailed over his judgment, which was normally sound. And once the course had been set, there was no turning back.

As I sat in our family room, I wondered whether he had known in advance about the break-in at the Watergate. (53-54)

The Nation Article

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

In February of last year, when *The Washington Post* obtained and printed advance excerpts from H.R. Haldeman's memoir, *The Ends of Power*, on the eve of its publication by Times Books, *The New York Times* called *The Post*'s feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here—a First Amendment principle that was central to the Pentagon Papers case."

In the issue of *The Nation* dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

The Ford Manuscript

The speech lasted fifteen minutes, and at the end I was convinced that Nixon was out of touch with reality. The fact that he was linking his resignation to the loss of his Congressional base shocked me then and disturbs me still. If he had been more contrite and asked the American people for forgiveness, he would have received a warmer response. Yet he couldn't take that final step. I'm convinced he thought what he said was enough. (57)

(2)

No. 83-1632

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. AND
THE READER'S DIGEST ASSOCIATION, INC.,
Petitioners,

—v.—

NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether the United States Court of Appeals for the Second Circuit correctly applied long established principles of copyright law to the facts of this case?

Parties Below

The parties to the proceedings below were Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc., plaintiffs, and Nation Enterprises and The Nation Associates, Inc., defendants.*

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* As required by Supreme Court Rule 28.1, Nation Enterprises and The Nation Associates, Inc. ("The Nation") advise the Court that they have no parent companies and no subsidiaries. The Nation Institute is an affiliate company of The Nation Associates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. AND
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—v.—

NATION ENTERPRISES AND THE NATION ASSOCIATES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set out in the Petition (Pet. at 2),[1] respondents Nation Enterprises and The Nation Associates, Inc. ("The Nation") have annexed to this brief additional statutory provisions also involved in this action.

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1 The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari, "Pet. App." for citation to the Appendix to the Petition, and, for example, "Tr. A-329" or "Pl. Ex. 6, El5" for citation to the joint appendix below.

STATEMENT OF THE CASE

On April 7, 1979, The Nation published a short news article reporting on information contained in former President Gerald R. Ford's forthcoming memoirs, the exclusive publication rights to which were owned by Harper & Row and Reader's Digest (hereinafter referred to as "H&R"). H&R filed suit, which Mr. Ford did not join, against The Nation in February, 1980 for $12,500. The complaint contained one count of copyright infringement under the Copyright Revision Act of 1976, 17 U.S.C. §§ 101, *et seq.* (1982), and three state law counts.[2] After a trial to the court, the district court held The Nation had infringed H&R's copyright and was liable for $12,500 in damages.

The Nation appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit, with one judge dissenting, reversed the district court. The court held that much of the material that H&R claimed had been copied in violation of their copyright was not copyrightable because that material was fact, was in the public domain, or was not original to the author. The court then held that The Nation's use of the material that was copyrightable was fair. A petition for *en banc* reconsideration was denied.

STATEMENT OF FACTS

A Time to Heal

In the spring of 1979, H&R jointly published *A Time to Heal: The Autobiography of Gerald R. Ford* (the "memoirs"). (Pet. App. at A-5; Tr. A-229) The book, as H&R perceived it, was to contain "significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon [and] (2) the circumstances and reasoning surrounding the

2 H&R cross-appealed from the district court's ruling that these counts were preempted. The Court of Appeals affirmed that ruling (Pet. App. at A-9 to A-14), and H&R have abandoned that issue in their Petition to this Court.

pardon of Mr. Nixon by Mr. Ford." (Pet. App. at A-5; Pl. Ex. 5, E530) To protect against uncompensated disclosure of such information, H&R's contract with former President Ford provided that, prior to publication, Mr. Ford would not reveal "information" about his presidency that he planned to disclose in the book. (Pet. App. at A-5; Pl. Ex. 6 ¶ 20(b), E551) Mr. Ford testified that he consequently refused to discuss publicly aspects of his presidency relating to his pardon of former President Nixon. (Pet. App. at A-5; Pl. Ex. 14, E654, E656-58)

On March 14, 1979, H&R sold first serial rights—the exclusive right to publish excerpts from the book prior to the book's publication—to *Time* magazine. (Pet. App. at A-5; Pl. Ex. 9, E565) *Time*'s license entitled it to publish in its April 23, 1979 issue approximately 7,500 words from Chapters One and Three of *A Time to Heal*; for that right *Time* agreed to pay to H&R $12,500 on signing the contract and $12,500 on April 16, 1979, the date on which *Time*'s April 23rd issue would be on sale. (Pet. App. at A-5; Pl. Ex. 9, E565-66) In the event that material from the two chapters was published in some other medium prior to *Time*'s use, the contract authorized a renegotiation of the amount of the second payment. (Pl. Ex. 9 ¶ 6(a), E566)

The Nation Article

Early in April, 1979, a copy of the 655 page, 200,000 word manuscript of *A Time to Heal* was provided to Victor Navasky, editor of The Nation. (Pet. App. A-6; Tr. A528) It is undisputed that the manuscript was not sought; it was not paid for; indeed, The Nation had had no prior connection of any sort with the book. (Pet. App. at A-6; Tr. A529)

The Nation published its 2,250 word article, entitled "The Ford Memoirs: Behind the Nixon Pardon," in its April 7, 1979 issue. (Pet. App. at A-6; Pl. Ex. 10, E569) Mr. Navasky had consulted with The Nation's counsel before publication and had been given a "green light" to publish under the fair use provisions of the Copyright Act. (Pet. App. at A-6; Tr. A561-64)

As its title suggests, The Nation's article centered about President Ford's pardon of former President Nixon. The article also reported other newsworthy information from the book not relating to the pardon; none of that information (including, *inter alia*, information about President Ford's retention of Henry Kissinger as Secretary of State and Mr. Ford's consideration of Ronald Reagan as his 1976 running mate) had been revealed to the public before. (Tr. A689-92)

On April 3, 1979, *Time* magazine's managing editor read The Nation article and called H&R to request that *Time* be permitted to publish its excerpts from President Ford's book one week earlier than the date provided for in the contract. (Pet. App. at A-8; Tr. A231-34) H&R refused *Time*'s request to publish one week early (Pet. App. at A-8; Pl. Ex. 31b, E827), thus leading *Time* not to print the excerpts from *A Time to Heal* and not to make the second $12,500 payment. (Tr. A245; Pl. Ex. 31b, E827) This action followed.

SUMMARY OF ARGUMENT

In one sense, this case arises out of facts unprecedented in this nation's history. The pardoning of one President by his successor was unique; that the successor had been chosen by the individual whom he pardoned made and makes the events of a decade ago matters of extraordinary public moment.

But if the roots of this action lie in momentous and unprecedented affairs of state, the decision of the Second Circuit in H&R's copyright action against The Nation rests firmly on a series of well-established and hardly controversial propositions of copyright law. H&R's challenge to the judgment of the Court of Appeals is based upon a misreading of the opinion of the Second Circuit and a misstatement of the law of other circuits so as to concoct a non-existent conflict among the circuits. There is no conflict among the circuits concerning the noncopyrightability of facts. There is no conflict among the

circuits as to the noncopyrightability of material already in the public domain or not original to an author. Most of the issues raised by H&R amount to nothing more than a disagreement with the application of those principles to the facts of this case. Nor did the Second Circuit's legal analysis of the fair use factors differ from that of this Court or other courts; all that differs is the facts of the cases to which those principles have been applied.

The decision of the Second Circuit is consistent with long established law and presents no occasion for review by this Court.

ARGUMENT

I.

IN DETERMINING THAT MUCH OF WHAT H&R CLAIM THE NATION COPIED WAS NONCOPYRIGHTABLE, THE SECOND CIRCUIT APPLIED LONG ESTABLISHED LAW THAT DOES NOT CONFLICT WITH RULINGS IN ANY OTHER CIRCUIT

The Second Circuit first reviewed The Nation article to determine to what extent the material H&R claimed had been copied was subject to copyright protection in the first place. In so doing, the court followed a long line of cases that have held that facts, material in the public domain, and material not original to an author are not copyrightable[3] and that copyright liability consequently cannot flow from publishing such material. (Pet. App. at A-14 to A-18) Adhering to the guidelines in the case law that distinguish between fact and expression, the

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3 *E.g.*, 17 U.S.C. §§ 102(a), 106(b) (1982); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962) (*per curiam*), *on remand*, 268 F. Supp. 444, 448 (D.D.C. 1967); *Baker* v. *Selden*, 101 U.S. 99, 103 (1879); *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *American Code Co.* v. *Bensinger*, 282 F. 829, 834 (2d Cir. 1922); *Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 147 (D.D.C. 1980); *Greenbie* v. *Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957); *Rokeach* v. *Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5670.

Second Circuit first concluded that, in addition to an author's language, protectable expression "exists, in part, in [an author's] overall arrangement of facts" and in the "structure he chooses for the work as a whole." (Pet. App. at A-16) Applying that principle of law to the facts of this case, the Second Circuit concluded that: "In this case, there can be no concern that this mode of expression was usurped; The Nation article drew only upon scattered parts and not the total entity with its unique and protected mosaic." (Pet. App. at A-16)

Since H&R hardly can claim to differ with the very proposition of law the cases they cite set forth,[4] *i.e.*, that the arrangement of materials is sometimes protected by copyright law, it is plain that H&R's core difference with the Court of Appeals is with the court's application of that proposition to the facts of this case. But disagreement—if any seriously may be said to exist—as to whether The Nation's brief article possibly may be said to have appropriated the "arrangement" and "totality" of the entirety of the memoirs is hardly an issue worthy of this Court's consideration.[5]

In apparent recognition of this, H&R urge that a phrase used by the Court of Appeals with respect to the nature of "expression" as opposed to "information" is inconsistent with previous decisions. (Pet. at 10-12) When material concerns news and history, the court observed, courts have "carefully con-

4 *See, e.g., Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981); *United States* v. *Hamilton*, 583 F.2d 448, 450 (9th Cir. 1978); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957).

5 That the Second Circuit was correct in so holding is perhaps best illustrated by the citation in plaintiffs' Exhibit 11 (Pet. App. at E-5 to E-41) of pages in the manuscript that H&R claim correspond to consecutive sections of The Nation article. Those pages are: 607-08, 451, 44, 456, 1, 2-3, 48, 7, 4-5, 5, 5-6, 8, 14, 15, 16, 16, 18, 17, 21, 266, 55, 246, 248, 249, 238-39, 239, 243, 245, 246, 250, 250-51, 251, 252, 253, 254, 256, 298, 299, 46, 494, 537, 155-56, 216, 415, 416, 416, 53-54, 57.

fined that troublesome concept 'expression' to its barest elements—the ordering and choice of the words themselves." (Pet. App. at A-19) That this previously has been held to be the law in the Second Circuit cannot be denied. The very case cited by the Court of Appeals, *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), so states.[6] Nor has that proposition been denied in other cases, including each and every case relied upon by H&R. (*See* Pet. at 11-12) For present purposes, it should suffice to say that the decision of the Court of Appeals as to copyrightability is grounded in the least controversial and most clearly established of all propositions of copyright law: facts may not receive copyright protection.

H&R's contention that the Second Circuit erred in concluding that "fact coupled with expression cannot constitute a copyrightable totality" (Pet. at 13) is based upon a mischaracterization of the opinion. The district court had refused to engage in any analysis whatsoever of whether The Nation had copied material that was copyrightable by H&R, reasoning that the facts set forth in the book "collected together with Ford's reflections" made up a "totality" protected by the copyright laws. The Second Circuit correctly held that those passages in the article that contained expression should be analyzed under the fair use doctrine.[7] The Second Circuit rejected the district court's conclusion that the presence of copyrightable "reflections" somehow could transform noncopyrightable fact into copyrightable expression. (Pet. App. at A-17) In doing so, the Second Circuit did no more than follow settled law, law cited

6 H&R's treatment of *Hoehling*, like its treatment of other cases relied upon by the Second Circuit that belie H&R's claim that the opinion below is inconsistent with earlier rulings, is to ignore it. (*See* Pet. App. at A-21, 27, 30) *See also Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). (*See* Pet. App. at A-15, 26-27)

7 Each of the examples of quotations by The Nation of language from the memoirs cited by H&R in their Petition to this Court was so analyzed by the Court of Appeals. (*Compare* Pet. at 7-8 *with* Pet. App. at A-23)

by H&R themselves, to hold that the facts in former President Ford's book are not copyrightable.

Finally, H&R are simply incorrect in their statement that the Second Circuit held "that almost unlimited paraphrasing from a work of nonfiction is permissible, unless the copier has 'borrowed virtually an entire work.' " (Pet. at 10) What the Second Circuit did hold was that if "paraphrasing" means reporting facts revealed in a book without using the author's expression, then, indeed, paraphrasing does not violate any copyright rights held by the author. As the Second Circuit stated:

> "Here, *The Nation* drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words." (Pet. App. at A-18)

This ruling is wholly consistent with prior rulings of the Second Circuit itself in *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), and *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), and with rulings in other circuits, *see, e.g.*, *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365, 1368 (5th Cir. 1981) ("[o]bviously, a fact does not originate with the author of a book describing the fact"); 1 M. Nimmer, *Nimmer on Copyright* § 2.11[A], at 2-158 (1983).

The purported conflict perceived by H&R between this portion of the Second Circuit's opinion and decisions of other courts is fanciful. In both *Flick-Reedy Corp.* v. *Hydro-Line Manufacturing Co.*, 351 F.2d 546 (7th Cir. 1965), and *Wagner* v. *Meccano Ltd.*, 246 F. 603 (6th Cir. 1917), *aff'g in part* 234 F. 912 (S.D. Ohio 1916) (Pet. at 14), the plaintiffs sued for infringement of a patent on machinery and of the copyright in an accompanying instruction manual. The courts in both cases found for the plaintiffs because the defendants had copied the entirety of the plaintiffs' manuals, with minor alterations, and had passed off the manuals as their own. Similarly, in *W.H.*

Anderson Co. v. *Baldwin Law Publishing Co.*, 27 F.2d 82, 86-87 (6th Cir. 1928), the court found that the defendant had used the plaintiff's entire annotated Code of Ohio to create a different annotated Code. The court concluded that both "literary expression" and the structure of plaintiff's work had been copied. *See* 127 F.2d at 86-89.[8]

In two of the three questions H&R urge are presented by this case, and throughout their brief, H&R repeatedly attempt to transform this unremarkable application of long standing legal doctrine into a clash between First Amendment principles and copyright law. (Pet. at 9-10, 15-17) The opinion of the Second Circuit, however, simply does not exhibit such a conflict. It has long been accepted that the fact/expression distinction is one of the mechanisms by which First Amendment concerns are accommodated within the law of copyright. 1 M. Nimmer, *Nimmer on Copyright* § 1.10[B], at 1-72-78; *see Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977); *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1179 n.2 (5th Cir. 1980) (Brown, J., concurring in part); *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977). For the Court of Appeals so to rule was to avoid a potential clash with First Amendment principles, not to create one.

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8 H&R's reliance on *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974) *(per curiam), aff'g* 378 F. Supp. 686 (S.D.N.Y. 1974) (Pet. at 15), is perplexing. *Meredith* was cited by the Second Circuit as an example of a case in which the entire structure of a book had been taken. (Pet. App. at A-16) In *Meredith*, the defendant purposefully took the plaintiffs' book "to serve as the content model [for its child psychology textbook] 'in terms of topics to be included, weighting of topics, and sequencing of topics.' " 378 F. Supp. at 687. In a later opinion granting a permanent injunction, the court held that the copying affected "the entire text and not just the eleven percent admittedly infringed." 413 F. Supp. at 387. Nothing of the sort has ever been alleged in this action.

II.

THE SECOND CIRCUIT'S FAIR USE ANALYSIS WAS IN CONFORMITY WITH THE STATUTE AND THE CASE LAW

H&R advance essentially two complaints about the Second Circuit's fair use analysis—that The Nation article did not contribute sufficiently to society or was not sufficiently productive to justify the invocation of the privilege of fair use (Pet. at 18-22), and that the unpublished nature of the memoirs should have prevented application of the fair use doctrine. (Pet. at 22-23) Neither perceived deficiency withstands analysis; neither, in any event, is an adequate ground to lead this Court to review the decision.

H&R's first contention may be met briefly: the statute itself includes news reporting as a presumptively fair use. 17 U.S.C. § 107 (1982). A benefit to society is presumed to flow from that activity. The panel below was unanimous in holding that the district court's decision that the article was not news reporting was clearly erroneous. (Pet. App. at A-25, A-45)

H&R press their claim that, because former President Ford's book was scheduled to be published shortly, the article made no contribution. (Pet. at 19) That never has been the legal test for fair use. If it were, any news article about a book, whether published before or after the book was available to the public, could be said to constitute a copyright violation on the ground that the book itself could be read.

Nor was the Second Circuit incorrect in deciding that it was error for the district court to hold that, in order that a use be fair, news must be "hot" enough to overcome a copyright violation. (Pet. App. at B-8) If that were the law, courts would be obliged to enter the thicket of determining how much benefit publishing a particular article conferred on the public. The law has never required or encouraged courts to engage in such an inquiry. Courts may, of course, decide that a claim that the use involved "news reporting" is a pretext. *See, e.g., Iowa*

State University Research Foundation, Inc. v. *American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The Second Circuit decided that the claim of news reporting in this action was not. (Pet. App. at A-25, 45)

The court below properly refrained from basing its decision upon its own subjective views of journalism: whether the journalism in The Nation article was "good" or, in the district court's revealing word, "poor" (Pet. App. at B-17), whether the article was necessary or superfluous. In accord with this view, courts have long eschewed determining the journalistic merit of a news article, the scholarly quality of a biography, and the like. *See Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 304, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting); *Pillsbury Co.* v. *Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981); *cf. Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

H&R misread this Court's decision in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), to support their contention that the article was a nonproductive use and that that factor should have been weighed in the fair use analysis. (Pet. at 21-23) As this Court well recalls, at issue in *Sony* was whether home videotaping was a productive use. *Id.* at 795 n.40, 807 (opinion of the Court per Stevens, J.; Blackmun, J., dissenting). The discussion in the dissent relied upon by H&R explicitly stated that news reporting was a presumptively productive use:

> "The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used 'for purposes such as a criticism, comment, news reporting, teaching, scholarship, or research.' The House and Senate Reports expand on this list

somewhat,[9] and other examples may be found in the case law. *Each of these uses, however, reflects a common theme: each is a productive use*, resulting in some added benefit to the public beyond that produced by the first author's work." *Id.* at 807 (emphasis added, footnote omitted).

Unless H&R are seeking *sub silentio* to challenge the unanimous holding of the court below that the article was news reporting, they are simply wrong that either the timing or the quality of the article should have prevented the successful application of fair use in this case, much less that this provides an adequate basis on which to invoke this Court's power of review.

H&R's final contention—that the unpublished nature of the work should preclude or narrow the fair use defense (Pet. at 22-23)—is unsupported by any citation to any court and was rightly rejected by the Second Circuit. Section 106 of the Copyright Act recognizes the right to distribute copies of the work as one of the exclusive rights granted to the copyright holder. 17 U.S.C. § 106(3) (1982). Rights under section 106, however, are expressly made subject to the fair use limitations of section 107. H&R's statement, that prior to the passage of the Act fair use was not permitted in an unpublished work, is not accurate. (Pet. at 22) Professer Nimmer writes:

> "It was sometimes stated that the defense of fair use was not available in actions for common law copyright infringement . . . . However, there are no cases squarely so holding, while some expressly or by implication have denied this proposition. The doctrine of fair use was upheld and expressly applied in a common law copyright action in Hemingway v. Random House, Inc., 53 Misc.2d 462, 270 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd on other*

9 In a footnote, the dissent quoted from further examples given in the House and Senate Reports on this section, which include the following example: "summary of an address or article, with brief quotations, in a news report." *Id.* at 807 n.29.

> *grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1969)." 3 M. Nimmer, *Nimmer on Copyright* § 13.05, at 13-54.1 n.2 (1983) (citations omitted).

H&R quote from the Senate Report concerning section 107 to the effect that fair use should be limited in unpublished works. (Pet. at 23) What H&R neglect to note is the context in which this quotation appears. In the course of explaining that if a work is out of print, "the user may have more justification for reproducing it," the Report states that this presumption that a use is fair will not apply if the work is purposefully unpublished. S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). Because the Court of Appeals did not rely upon the unavailability of the memoirs as a factor in favor of a finding of fair use, this passage is not even relevant.

The Second Circuit's analysis of fair use was consistent with long-standing interpretations of the copyright laws. It provides no basis for plenary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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SUPPLEMENTARY APPENDIX

Supplementary Appendix

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 102 of the Copyright Revision Act of 1976, 17 U.S.C. § 102 (1982), provides that:

> "(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> "(1) literary works;
>
> "(2) musical works, including any accompanying words;
>
> "(3) dramatic works, including any accompanying music;

"(4) pantomimes and choreographic works;

"(5) pictorial, graphic, and sculptural works;

"(6) motion pictures and other audiovisual works; and

"(7) sound recordings.

"(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. § 107 (1982), provides that:

"Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

"(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

"(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly."

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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,
Petitioners,

v.

NATION ENTERPRISES and
THE NATION ASSOCIATES, INC.,
Respondents.

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITIONERS

THE INTEREST OF AMICUS CURIAE

The Association of American Publishers, Inc. (AAP) submits this brief Amicus Curiae (with the consent of the parties) in support of Petitioners, Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. For the reasons discussed below, AAP urges that the decision of the Court of Appeals be reversed and that this Court reinstate the conclusion of the District Court that Respondents infringed the Petitioners' copyright by reproducing without authorization excerpts from the Petitioners' about to be published manuscript.

AAP is a trade association of book publishers in the United States. Its more than 300 member companies and subsidiaries publish between 70% and 75% of the dollar volume of all books published in the United States. These publications include

biographies of and autobiographies by public figures, histories, and other works of non-fiction, as well as of fiction. Virtually all of such publications are protected by copyright.

As publishers, AAP members have a direct and compelling interest in both Constitutional provisions put at issue by the court below: the Copyright Clause (Art. I, § 8, cl. 8) and laws enacted thereunder; and the First Amendment. AAP members invest substantial resources in the acquisition, development, editing, and marketing of their works, and are at the heart of the publishing process through which literary works are made available to the public.

The decision of the court below poses a false dichotomy between copyright and First Amendment considerations, ignores authors' and publishers' fundamental right of first publication, sanctions serious interference with the publishing process, and substantially limits the protection of non-fiction works against non-literal copying. To the extent that these conclusions may be sustained, the interests of AAP members—indeed, of all who write and read biographies, histories, autobiographies and other non-fiction works, and of the public—would be seriously prejudiced.

PRELIMINARY STATEMENT: PUBLISHERS, THE FIRST AMENDMENT, AND COPYRIGHT

This case must not be viewed as pitting a "pro First Amendment press" against an "anti First Amendment publishing industry." Book publishing is an endeavor that thrives on First Amendment freedoms no less than the efforts of the working press. It is clear that AAP members' books are entitled to the same First Amendment protections as are newspapers and magazines. *E.g., Lovell v. Griffen*, 303 U.S. 444, 452 (1938); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *Smith v. California*, 361 U.S. 147, 150 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963). Book publishers have not been insensitive to the preservation of these values. Publishers and their authors:

> "... have fought—often courageously and at great personal sacrifice—against efforts at suppression and censorship inspired by political, philosophical, religious, and moral persuasions. Had it not been for the battles and unceasing vigilance of many authors and publishers some great works of philosophy, religion, political theory, and literature would not now be available in libraries and bookstores."

J. Dessauer, *Book Publishing* 15 (1974).

But if the First Amendment is the moral force of publishing, copyright is its commercial foundation. For the most part, and in this case, these twin underpinnings of book publishing—copyright and the First Amendment—do not conflict. This is not surprising, for copyright and the First Amendment are essentially complementary.[1]

Freedom of expression is meaningless unless works are created and distributed. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963) this Court recognized the "economic stake" of book publishers in recouping their publishing investment and concluded that protection of this interest would serve the First Amendment. Our copyright law is based on the principle that:

> "... encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the Useful Arts.'"

Mazer v. Stein, 347 U.S. 201, 219 (1954). *See also, e.g., Sony Corporation of America v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S. Ct. 744, 782 (majority opinion per Stevens, J.) & 806-07 (dissenting opinion per Blackmun, J.), *reh'g denied*, 104 S. Ct. 1619 (1984). Thus, the copyright law assures that there is opportunity for recoupment of the intellectual and

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[1] The Constitutional authority for copyright laws is, in fact, premised on the principle that "The public good *fully coincides* with the claims of individuals ...." J. Madison, *The Federalist* No. 43 at 279 (Mod. Lib. ed. 1941) (emphasis added).

financial investment of authors and publishers, that their creative efforts are maintained, and that their works are made available to the public.[2] It is essential to the purpose of the First Amendment.

These principles are no less applicable to the written reflections of former public officials:

> "Indeed, if the doctrine were otherwise, that no person, or his representatives, could have a copyright in his own private or familiar letters, written to friends, upon interesting political and other occasions, or containing details of facts and occurrences, passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty than they otherwise would be. What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings, which now encourages their publication thereof, from time to time, after the author has passed to the grave. To this we owe, not merely, the publication of the writings of Washington, but of Franklin, and Jay, and Jefferson and Madison, and other distinguished statesmen of our own country."

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[2] This case no more involves a contest between "publishers" and the "press" than it does between First Amendment/copyright interests or First Amendment sympathies. Book publishers play as key a role in bringing newsworthy materials before the public as do newspapers, magazines, and television and radio newscasts. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffen*, 303 U.S. 444, 452 (1938).

Folsom v. Marsh, 9 F. Case 342, 346-47 (C.C.D. Mass. 1841) (No. 4,901) (Story, J.).

The majority of the Court of Appeals ignored this coincidence of copyright and First Amendment interests. Its First Amendment concerns (723 F.2d at 197, 203, 204, 209) may be legitimate in the abstract, but they should not have been applied to the facts of this case or to eliminate consideration of the unpublished nature of Respondents' work (Point I) or restrict protection of non-fiction works against non-literal copying (Point II).

This case is based on the unauthorized reproduction of substantial expression from an unpublished, but about to be published manuscript. Respondents unjustifiably intruded into the publishing process and destroyed the value of Petitioners' first serial rights and the imminent authorized publication of the work in a mass circulation weekly. Vindication of Petitioners' position here will not, as the Court of Appeals majority feared, "impede the harvest of knowledge . . . ." (723 F.2d at 197). To the contrary, it will preserve the integrity of the publishing process, maintain the copyright principle of economic incentive, and assure the First Amendment interest in public availability of creative works. It will, in short, keep both copyright and the First Amendment in vital balance.

SUMMARY OF ARGUMENT

Congress intended that the fair use doctrine be "narrowly limited" in its application to unpublished works, and that "under ordinary circumstances" it should not be applied to privilege the unauthorized reproduction of such works. The Court of Appeals erred in failing to consider this principle.

There are no extraordinary circumstances that would justify the application of fair use to Respondents' unauthorized use of Petitioners' unpublished manuscript in this case. The manuscript had not been disseminated and was about to be published by Petitioners and their licensee in any event.

The limited applicability of fair use to unpublished works, and its inapplicability in this case, is based on fundamental principles of fairness, privacy, and protection from commercial injury.

The Court of Appeals also erred in limiting the copyright protection of a non-fiction work against unlawful paraphrasing to instances where "virtually the entire work" is taken.

ARGUMENT

I. The Court of Appeals Erred in Failing to Consider the Unpublished Nature of Petitioners' Work. Respondents' Copying Was Not a "Fair Use" of Petitioners' Unpublished Work.

At the time of its receipt by Mr. Navasky and of the appearance of the *Nation* article, Petitioners' manuscript was as yet unpublished. Publication in both abridged, i.e., first serial, and full book-length form was, however, imminent. Respondents, having ascertained the manuscript's book and first serial publication schedule, were well aware of this.[3] The District Court properly concluded that:

> "The copyrighted work is an unpublished, autobiographical manuscript, entitled to copyright protection. The fair use defense is narrowed when the work is unpublished."

District Court Conclusion of Law 6(b); see also, the District Court's opinion, 557 F. Supp. at 1072 ("... the infringed work was soon to be published.") In reversing the decision of the District Court, the Court of Appeals totally ignored this factor.

The Court of Appeals' failure to consider the unpublished nature of the copyrighted work was error. For the reasons given below, under the circumstances of this case Respondents' copying from such material cannot be justified as a fair use.

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[3] 557 F. Supp. at 1069. Excerpts from the manuscript were to be first published in the April 23, 1979 issue of *Time* magazine, which would reach the newsstands on April 16. Shipment of hard cover books was to follow on April 24 or 25 for availability in bookstores on May 1. District Court Findings of Fact 26, 27. Respondents, conceding their purpose to "scoop" authorized publication, had determined Petitioners' publication schedule and caused the *Nation* article to be placed on sale by April 3. District Court Findings of Fact 34, 67.

Among the exclusive rights of a copyright owner is that of "first public distribution". 17 U.S.C. 106(3); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess. 58 (1975). This right of first publication is a fundamental attribute of copyright ownership. In its reports accompanying the 1976 Copyright Act, Congress clearly expressed its intent that:

> *"The applicability of the fair use doctrine to unpublished works is narrowly limited* since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. *Under ordinary circumstances the copyright owner's 'right of first publication' would outweigh* any needs of reproduction for classroom purposes." (Emphasis added)

S. Rep. No. 94-473, *supra* at 64; H.R. Rep. No. 83, 90th Cong., 1st Sess. 34 (1967). This language is not expressly repeated in the 1976 House Report (H.R. Rep. No. 94-1476, *supra*) but its omission has no significance since the 1976 House Report reviewed, approved, and incorporated the fair use analyses of the 1967 House and 1975 Senate reports by reference. See H.R. Rep. No. 94-1476, *supra* at 67.

Similarly, the references in the reports to "classroom" use arise only from the fortuitous appearance of this point during the discussion of educational copying. They do not indicate that a different standard applies to other uses.[4] The pertinent reports expressly state:

> "The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. *It must be emphasized again that the same general*

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[4] *Cf.*, for example, the discussion in the classroom context of the pertinence of "nonprofit" use and the use of "excerpts and quotations," in S. Rep. No. 94-473, *supra* at 63-65. It can hardly be argued that these considerations are irrelevant in other contexts. See, e.g., *Sony Corporation of America v. Universal City Studios, Inc.*, ____U.S.____, 104 S. Ct. 774, 795 n.40, *reh'g denied*, 104 S. Ct. 1619 (1984).

> *standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case."*[5]

H.R. Rep. No. 94-1476, *supra* at 72 & S. Rep. No. 94-473, *supra* at 65 (emphasis added); and

> "... it should not be inferred that uses of copyrighted material for instructional purposes are subject to different criteria from uses for other purposes."

H.R. Rep. No. 83, *supra* at 32.

In their Brief in Opposition to the petition for certiorari (at p. 13), Respondents appear to argue that the legislative reports' comment on fair use of unpublished works is merely a rebuttal of an alleged "presumption" of fair use for out-of-print works. This construction is wholly strained. Nothing in the reports remotely suggests any pertinent congressional intent other than to "narrowly limit" fair use of unpublished works. If anything, the reports' distinction between previously published but out-of-print works and unpublished works demonstrates that Congress intended to fully reserve the copyright owner's right of *first* publication except in extraordinary circumstances.

In sum, it is clear that Congress intended a "narrowly limited" application of the fair use doctrine to unpublished works, and that—other than in extraordinary circumstances—fair use should not justify an unauthorized first publication.

In its recent decision in *Sony Corporation of America v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S. Ct. 774 (at 791 n.29, 792 n.32 and 795 n.40), *reh'g denied*, 104 S. Ct. 1619

[5] Application of the various factors of fair use will, of course, vary from "case to case" in determining the final balance. Our point is that the Court of Appeals erred in not applying the factor of "unpublished work," that Congress has clearly given a particular weight to this factor absent extraordinary circumstances, and that under all the circumstances of *this* case, the Respondents' use of the unpublished Ford memoirs was not fair.

(1984) this Court relied upon the 1976 Act's legislative reports as meaningful guidelines to application of the fair use doctrine.[6] The Court of Appeals' failure to consider Congress' intent to limit fair use of unpublished works to exceptional cases was erroneous. Moreover, there are no pertinent circumstances that would permit the application of fair use in this case.

AAP does not contend that there can never be a fair use of an unpublished work. The qualification in the legislative

[6] For a recent decision in which the court—as did the District Court in this case—properly noted the unpublished nature of plaintiffs' work and Congress' intent to narrowly restrict fair use of such works, see *Schuchart & Associates Professional Engineers, Inc. v. Solo Serve Corporation*, 220 U.S.P.Q. 170, 182 (W.D. Tex. 1983). Other cases in which the courts have relied on the congressional reports in deciding questions of fair use under the 1976 Act include *Marcus v. Rowley*, 695 F.2d 1171, 1175, 1177-78 (9th Cir. 1983); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 97 n.4 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *Encyclopaedia Brittannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1175, 1177, 1179 n.19 (W.D.N.Y. 1982) and 558 F. Supp. 1247, 1250-51 (W.D.N.Y. 1983); and *Italian Book Corp. v. American Broadcasting Cos., Inc.*, 458 F. Supp. 65, 70-71 (S.D.N.Y. 1978).

In *Diamond v. Am-Law Publishing Corp.*, Copr. L. Rep. (CCH) ¶ 25,627 (S.D.N.Y. 1984) the court did apply fair use to a newspaper's publication of excerpts from a letter written to it. Although the letter had been intended for publication by the newspaper, plaintiff objected to the printing of less than its entirety. Even if we assume the letter was "unpublished" (this is not clear from the opinion and it is not beyond reasonable possibility that plaintiff showed or circulated copies to others), the decision does not undermine *amicus'* position here. First, because the court did not pass upon the issue and thus, at most, simply erred in failing to consider it. Second, and more important for present purposes, plaintiff had communicated the letter to defendant *for publication* and the court concluded that "[i]n writing his version of the facts to the American Lawyer, plaintiff had no right to commandeer the space of the publication for *all* that he wished to say." (emphasis added.) *Id.* at 18,825. This case can well be considered to involve extraordinary circumstances. Indeed, it appears to fall within an exception *amicus* concedes for disclosed but unpublished works. See text and n.7-8 below; *cf. Copyright Law Revision—Part 2: Discussion and Comments on Report of the Register of Copyrights on General Revision of the U.S. Copyright Law* at 27 (H.R. Comm. Print, 88th Cong., 1st Sess. February 1963) (disclosure of manuscript permitting fair use by recipient).

reports that the right of first publication will prevail "under ordinary circumstances" leaves the way open for a different result in other circumstances.

Such circumstances could arise in connection with the limited circulation of a literary work that has not yet been published. If, for example, a publisher prior to publication should distribute a few copies of the work to critics for review, or make a copy available to a journalist for publicity, it might under appropriate circumstances be precluded from claiming infringement by publication of a review or article including quotations from the work. Similarly, if a work should be "performed" on stage or television, one could hardly claim that a critical account or news report of the work including reasonable excerpts is barred from fair use. [The "performance" (including telecasts) of a work is not a "publication." See 17 U.S.C. § 101 (definition of "publication").]

It is most likely that variations upon this theme of "disseminated but unpublished" works were a principal consideration behind the reports' cautionary use of "ordinary circumstances."[7] However, no such situation is presented here. Respondents gave the *Nation* no prepublication copy,[8] and there

[7] During the early discussions of proposals for copyright revision, it was specifically noted that fair use should apply to disseminated or disclosed, but technically unpublished, works. Illustrations of critical reviews of televised plays and reports by columnists who were shown prepublication manuscripts were expressly given. *See Copyright Law Revision—Part 2: Discussion and Comments on Report of the Register of Copyrights on The General Revision of the U.S. Copyright Law* at 27 (H.R. Comm. Print, 88th Cong., 1st Sess. Feb. 1963) (Colloquy among Register of Copyrights Kaminstein, Harry Olsson, Esq. and John Schulman, Esq.). The meetings at which these discussions took place were noted in the House and Senate reports accompanying the 1976 Copyright Act. See S. Rep. No. 94-473, *supra* at 47; H.R. Rep. No. 94-1476, *supra* at 47. A like point was made in one of the leading fair use articles published prior to the reports, Cohen, *Fair Use In The Law of Copyright*, 6 Copyright Law Symp. (ASCAP) 43, 51 (1955).

The likelihood that the cautionary language in the legislative reports was motivated by realistic considerations pertaining to "disseminated but unpublished" works is also suggested by a corresponding development in British-law countries under the analogous concept of "fair dealing." Thus, in the United Kingdom such early cases as *Prince Albert v. Strange*, 2 DEG. & SM

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was no prepublication performance, circulation, or other pertinent disclosure of the manuscript. *See* District Court Finding of Fact 30.

(footnote 7 and 8 continued)

652 (1849) and *Macklin v. Richardson*, Amb. 694, Case 341 (1770) were often considered to preclude the defense of fair dealing in the case of unpublished works. See, *e.g.*, A. Weil, *American Copyright Law* 115 (1917); *Copyright and Designs Law—Report of the Committee to Consider the Law on Copyright and Designs* (Whitford Report) 172 at ¶676 (March 1977) ("... there should be full freedom to criticise and comment upon all *published* works ...") (emphasis added). However, it was soon understood that fair dealing could apply to dramatic and musical works that were publicly performed. *E.g.*, *British Oxygen Company, Ltd. v. Liquid Air, Ltd.*, [1925] Ch. 383, 393; M. Flint, *A User's Guide to* [*U.K.*] *Copyright* § 10.06 at 50 (London, 1979); W. Copinger & E.P. Skone James, [*U.K.*] *Copyright* § 463 at 178 (London, 10th Ed., 1965). Doubt remained that fair dealing could apply to unpublished literary works. *British Oxygen Company, Ltd. v. Liquid Air, Ltd., supra.* However, in *Hubbard v. Vosper*, [1971] 1 All E.R. 1023, 1027-28 (involving the use in a book of letters circulated to members of a religious group) the court concluded that: "Although a literary work may not be published to the world at large, it may, however, be circulated to such a wide circle that it is 'fair dealing' to criticise it in a newspaper, or elsewhere. This happens sometimes when a company sends a circular to [its] shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it and to criticise them—or review them—without thereby being guilty of infringing copyright." This was followed in *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241, 263 in which the court defined the factors relevant to the issue of "fair dealing" with a literary work as "whether the work is unpublished; and the extent to which the work has been circulated, although not published to the public within the meaning of the Copyright Act." (The court refused to sustain the defense of fair dealing, noting *inter alia*, that the work was unpublished and had not been made available, and that the memorandum in question was "obtained and used without the author's consent in the correct conviction that, if consent had been sought, it would have been refused."). Similarly, in *The Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, [1974] 1 All E.R. 41, 52 the court entered an interlocutory injunction since it "doubt[ed] whether the plaintiff's documents could be said to have been circulated so widely that, though not published generally, it is fair dealing to criticise them." *See also, Hindley v. Higgins*, Ct. App., Civ. Div., Aug. 24, 1983 (unpublished; on Lexis) (only possibility of prior publication might justify fair dealing). (In an exceptional case, *Lion Laboratories v. Evans*, [1984] 2 All E.R. 417, the court lifted an interlocutory injunction, leaving substantive issues for trial, where the copyright claim would have suppressed awareness of documents

(footnote 7 and 8 continues)

Another extraordinary circumstance could arise if a plaintiff were seeking to use the copyright law to suppress disclosure of information of overriding public importance. *Cf. Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). But this situation does not arise here. The basic facts and events related in the work—as distinguished from their literary expression resulting from the collaborative efforts of President Ford, Mr. Armbrister, and Petitioners—had already been made public (District Court Findings of Fact 23, 44, 45) and even the use of facts and events from the manuscript would not be precluded by Petitioners' copyright claim.[9] Most importantly, the *Time* article and the book itself were shortly to be published in any event. Upon

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(footnote 7 and 8 continued)

casting doubt on the validity of plaintiff's device, which was used as the basis of current criminal prosecutions. Unlike the present case, the documents in *Lion* were considered of vital current importance to the administration of criminal justice, and were not going to be published by their holder. See p. 12, *infra*.)

Similarly, Canadian law has been said to bar fair dealing in unpublished works. *E.g.*, H. Fox, *The Canadian Law of Copyright* 425 (Toronto, 2d Ed. 1967); A. Keyes & C. Brunet, *Copyright in Canada—Proposals For A Revision of the Law* 148 (Consumer & Corporate Affairs Canada 1977). However, a copyright revision study recommended that fair dealing should be applied to both generally published and performed works. B. Torno, *Fair Dealing: The Need for Conceptual Clarity on the Road to Copyright Revision* 38 (Consumer & Corporate Affairs Canada 1981). Most recently, the Canadian Government proposed that a new Canadian fair use doctrine "apply to all copyrighted subject matter *that has generally been made available to the public, regardless of whether such material has been published in the traditional sense.*" J. Erola & F. Fox, *From Gutenberg to Telidon—A White Paper on Copyright: Proposals for Revision of the Canadian Copyright Act* 40 (Consumer & Corporate Affairs Canada 1984) (Emphasis added).

[8] The instant case is therefore clearly distinguishable from *Diamond v. Am-Law Publishing Corp.*, *supra* n. 6. Additionally in this respect, we must note the clandestine source of the manuscript and Mr. Navasky's knowledge that his receipt was unauthorized. See District Court Finding of Fact 33.

[9] 17 U.S.C. § 103(b). *See e.g., New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 215 U.S.P.Q. 755, 757 (D. Mass. 1981) (Rejecting fair use defense based on news reporting because, *inter alia*, "while protection of the public right of access to [newsworthy] information is a primary justification for the fair use defense, this right is sufficiently

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publication in serial and book form, the work and its contents would have been readily available to the public without temporal or other restraints; and copyright would not preclude the *Nation* from prepublication reporting of the facts, ideas, and events in the manuscript or post-publication quotation of reasonable excerpts of expression. (Additionally, the *Nation* acted for commercial self interest. See District Court Findings of Fact 54, 57.) This case thus does not raise the danger of "merely inhibiting access to ideas" that concerned this Court with respect to the prohibition of certain noncommercial uses in *Sony Corporation of America v. Universal City Studios, Inc.*, *supra* 104 S. Ct. at 793. *Cf.*, e.g., *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). ("We conclude that in this case where there is no judicially cognizable allegation that the interested public has been denied access to these works, the balance of the First Amendment interests is, if anything, tilted in the direction of the holders of copyrights.")

Nor are there other extraordinary circumstances that would support the application of fair use to Petitioners' unpublished work in this case. That Petitioners' work represented the memoirs of a former President does not detract from the protection of its expression under the Copyright Act and its underlying principles. *See*, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 346-47 (C.C.D. Mass. 1841) (No. 4,901); p. 4 *supra*. Indeed, if factors extrinsic to the unpublished/undisseminated/soon-to-be published calculus are pertinent here, then one must consider such elements as the spurious provenance of the unauthorized manuscript, and the *Nation*'s knowing receipt and deliberate use of substantial literary expression from an unauthorized source to interfere with Petitioners' customary first serial rights for its self-serving commercial purposes. *See*, e.g., Dist. Ct. Findings of Fact 33, 54, 57, 66, 67. These provide further support for the inapplicability of fair use. See, e.g., *Time, Inc. v. Bernard Geis Associates*, 298 F. Supp. 130, 146 (S.D.N.Y. 1968) ("Fair use presupposes good faith and fair dealing.")

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protected merely by enabling defendants to report the underlying facts that the plaintiffs' videotapes record. It does not permit defendants to appropriate the plaintiffs' *expression* of that information . . . .") (emphasis in original); *see also*, cases cited at p. 21 of this brief.

The principle that fair use must be narrowly restricted to extraordinary circumstances in the case of unpublished works is not new to the 1976 Copyright Act. It derives from a similar principle under the regime of common law copyright prior to its preemption by the 1976 law.[10] Although Respondents' arguments in the Court of Appeals and in opposition to this Court's grant of certiorari repeatedly denied this general rule, it is more than amply supported. *See, e.g., Press Pub. Co. v. Monroe,* 73 F. 196 (2d Cir. 1896) (by implication); *Golding v. RKO Radio Pictures, Inc.,* 193 P.2d 153, 163 (Cal. Dist. Ct. App. 1948), *aff'd,* 221 P.2d 95 (Cal. 1950); *Stanley v. Columbia Broadcasting System, Inc.,* 35 Cal. 2d 652, 661, 221 P.2d 73, 77-78 (Cal. 1950) (en banc); *Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law, supra* n.10 at 40; Latman, *Fair Use of Copyrighted Works,* Copyright Law Revision Study No. 14 at 7 (H.R. Comm. Print, 86th Cong., Sess. 1960); Strauss, *Protection of Unpublished Works,* Copyright Law Revision Study No. 29 at 4, n.32 (H.R. Comm. Print, 86th Cong., 2d Sess. 1960); A. Weil, *American Copyright Law* 115 (1917); H. Ball, *Law of Copyright* 260 n.5 (1944); R. Shaw, *Literary Property in the United States* 67 (1950). See also, P. Wittenberg, *Protection of Literary Property* 125 (1968) ("Before publication there can be no fair use of works protected under common law copyright;" but implying that this remains true only "as long as an author keeps his work confidential and uncommunicated . . ."); Cohen, *Fair Use in the Law of Copyright,* 6 Copyright Law Symp. (ASCAP) 43, 51 (1955) (Suggesting that the general principle precluding fair use of common law works would not apply to publicly performed but unpublished works); *Caliga v. Inter Ocean Newspaper Co.,* 215 U.S. 182, 188 (1909) ("At common law the exclusive right to copy existed in the author until he permitted a

[10] See *Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law* 40 (H.P. Comm. Print, 87th Cong., 1st Sess., July 1961). AAP does not contend that common law copyright *absolutely* precluded fair use in all circumstances. In appropriate cases, such as those involving disseminated but unpublished works, a privilege of fair use may have been accorded at common law had the occasion arose. *See generally,* authorities cited in fn. 7, *supra.*

general publication."); *Atlas Mfg. Co. v. Street & Smith,* 204 F.2d 398, 402 (8th Cir.), *appeal dismissed,* 231 U.S. 348 (1913) (At common law, author had "exclusive right to the first publication" of his work.); *Fendler v. Morosco, infra.*

The authorities relied on by Respondents to refute this proposition are unavailing. In *Fendler v. Morosco,* 253 N.Y. 281, 171 N.E. 56, *reh'g denied* 254 N.Y. 563, 173 N.E. 867 (N.Y. 1930) the court, finding no copying, expressly declined to pass on the fair use question, but did observe: "Since plaintiff had not published or produced her play, perhaps any use that others made of it might be unfair." 253 N.Y. at 291. In *Estate of Hemingway v. Random House, Inc.,* 53 Misc. 2d 462 (N.Y. Sup. Ct.), *aff'd,* 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd on other grounds,* 23 N.Y.2d 341 (N.Y. 1968), the trial court did refer to fair use in a common law action. However, this was a misuse of the term (or at least a use not pertinent to the doctrine at issue here) since the court was apparently referring to "minor" and "trivial"—i.e., *de minimis*—uses (53 Misc. 2d at 466) which preclude infringement even absent fair use considerations. See generally, 3 M.B. Nimmer, *Nimmer on Copyright* §§ 13.03[A] at 13-32, 13.05 at 13-55—13-56 (1983). Moreover, the trial court also appeared to be referring to the use of *published* materials (53 Misc. 2d at 465-66) or materials intended for general release (i.e., a press release) (53 Misc. 2d at 466). Although the trial court also dealt with alleged infringement of letters and oral conversations, its reference to fair use did not extend to these materials [see 53 Misc. 2d at 467 (letters; no copying) and 468-471 (oral conversations; no right to preclude publication by participant)]. Additionally, the New York Court of Appeals, noting that it was agreeing with the disposition of the case only "on a ground more narrow" than the trial court (23 N.Y.2d at 345), decided the case solely on the ground that defendant's author had implied-in-fact consent from Hemingway for its publication; the appellate court did, however, emphasize the importance of common law rights in protecting against unauthorized disclosure (23 N.Y.2d at 347-48). Finally, it has been suggested that the

action was designed to suppress information. Goldstein, *Copyright and The First Amendment*, 70 Colum. L. Rev. 983, 1004 (1970); *see* p. 12-13, *supra*. The decision, in sum, lends no meaningful support to Respondents' position.[11] Indeed, in view of the express language in the legislative reports, Respondents' denials and purported authorities can have no significance.

In its arguments below, Respondents also relied upon Congress' elimination of the "prepublication/publication distinction" between common law and statutory copyright. Brief of Defendants—Appellants—Cross-Appellees before the U.S.

[11] Respondent also relied on Professor Nimmer's statements that (a) "there are no cases squarely . . . holding [that the defense of fair use was not available at common law]"; and (b) "some [cases] expressly or by implication have denied [the] proposition" that fair use was not applicable at common law. 3 M.B. Nimmer, *Nimmer on Copyright* § 13.05 n.2 (1983). In light of the opinions in *Press Publishing Co. v. Monroe, Golding v. RKO*, and *Stanley v. CBS, supra*, and the fact that in each case defendant was held liable, Professor Nimmer's first point is difficult to accept. The only case cited by Professor Nimmer in direct support of his second point is *Hemingway* which, as indicated above, does not effectively refute the general principle. He also cites (as "see" citations) *Malkin v. Dubinsky*, 203 N.Y.S.2d 501 (Sup. Ct. 1960), *Weitzenkorn v. Lesser*, 40 Cal.2d 788, 256 P.2d 947 (Cal. 1953) and *Fendler v. Morosco, supra*. However, *Fendler*, as noted earlier, expressly stated that use of an unpublished unproduced play might be "unfair," and that decision turned on no copying. *Malkin* turned wholly on the presence of only trivial and insignificant similarities and no copying, and *Weitzenkorn* turned on the lack of copying of protected elements. Neither dealt with fair use as that doctrine is here at issue. Cf. 3 M.B. Nimmer, *Nimmer on Copyright* § 13.05 at 13-55—13-56 (1983); *see also, id.* at § 13.03[A] at 13-32 (references to fair use to cover insubstantial similarity are "unfortunate"). (Perhaps Professor Nimmer's reliance on *Fendler* is attributable to the fact that the opinion includes passing reference to isolated quotations from *Folsom v. Marsh, supra* [253 N.Y. at 291] and an early lecture [253 N.Y. at 292] that are suggestive, at most, of the fair use doctrine as it has since developed. This may also underlie his reference to *Malkin* [see 203 N.Y.S.2d at 507, quoting *Fendler*]. If this is the case, it is a thin reed on which to base refutation of the commonly acknowledged principle that fair use generally did not apply to common law actions, and can be given no significance in light of the statement by the New York Court of Appeals in *Fendler* that any use of an unpublished, unproduced play might be unfair.) In any event, given the clear statements in the legislative reports that fair use of unpublished works must be "narrowly" restricted to extraordinary circumstances, debate over the precise rule at common law has no real meaning here.

Court of Appeals for the Second Circuit at 33. However, the elimination of publication "as a dividing line between common law and statutory protection" (H.R. Rep. No. 94-1476, *supra* at 129, quoted in Brief, *supra* at 33) does not mean that the question of whether a work is or is not published is irrelevant for all purposes. *See, e.g.*, 17 U.S.C. §§ 104, 203, 302, 303, 401, 403, 405-409, 412. In eliminating common law copyright, Congress brought the traditional "right of first publication" under the Federal ambit of protection. *See* H.R. Rep. No. 94-1476, *supra* at 62; S. Rep. No. 94-473, *supra* at 58. And in codifying the doctrine of fair use, Congress did not intend to "change, narrow, *or enlarge it* in any way. H.R. Rep. No. 94-1476, *supra* at 66; S. Rep. No. 94-473, *supra* at 62; *Sony Corporation of America v. Universal City Studios, Inc., supra* at 791-92 n.29 (emphasis added). Respondents' earlier, unwarranted, extrapolation of Congress' intent with respect to the significance of publication ignores these points; but most importantly, their assertion that "there is no basis for concluding that Congress . . . intended" the prepublication/publication distinction to be pertinent to fair use (Brief, *supra* at 33) is expressly contradicted by the legislative reports referred to above.

The principle that application of the fair use doctrine to unpublished works must be narrowly circumscribed is grounded in several basic and related policy considerations. Perhaps most fundamentally, it simply cannot be "fair" to intrude into the process of authorship or publishing and, without authorization, first present the creators' literary expression to the public. This offends not only common notions of equity, but those of privacy as well. The fact that a work is soon to be published does not detract from these considerations. For reasons both personal and economic, the creators of a work must generally have the right to present it in such form, and with such revisions and refinements, as they determine. The right of first publication is an important safeguard of "commercial interest" because it "covers the *critical period* for management of any artistic work, extending from the work's

initiation through its preparation for . . . dissemination." Goldstein, *Copyright and the First Amendment,* 70 Colum. L. Rev. 983, 1004 (1970) (emphasis added). No public interest is served in the ordinary case by depriving authors and publishers of these prerogatives and conferring them on an interloper.

Most importantly, and as occurred here, preemptive publication of a literary work will have a direct adverse impact on the established market for first serial rights in books. *See* District Court Findings of Fact 38, 66; *see also,* 557 F. Supp. at 1072-73. Proper fair use analysis requires consideration of the cumulative effect of many persons engaging in the defendant's activity. *Sony Corporation of America v. Universal City Studios, Inc.,* ____U.S.____, 104 S. Ct. 774, 793, *reh'g denied,* 104 S. Ct. 1619 (1984) (proof that if a particular use "should become widespread it would adversely affect the market" negates fair use); *see generally,* 3 M.B. Nimmer, *Nimmer on Copyright* §§ 13.05[A][4] at 13-65, 13.05[E][4] at 13-84 (1983). It is difficult, at best, to see how first serial rights in non-fiction works can survive in the atmosphere condoned by the Court of Appeals. Yet subsidiary rights, including first serial rights, are of great importance to authors and publishers. Indeed, "in recent years . . . the successful exploitation of . . . subsidiary rights has become a very real necessity, often separating the difference between an unsuccessful and a successful" publishing venture. Marks, *Subsidiary Rights and Permissions* in C. Grannis (Ed.), What Happens in Book Publishing 230 (1967). And single-issue first serial rights of the kind involved here are particularly important to works of non-fiction. See *id.* at 232.

As indicated above, the *potential* adverse market effect of unauthorized first publication goes beyond first serial rights to the value of copyright in the book itself, and of post-publication subsidiary rights, since it deprives the publisher of the opportunity to control the groundwork and planning it considers best suited to the circumstances. Injury to first serial rights is particularly troubling because their careful handling is itself part of the "groundwork" for successful exploitation of a book and post-publication subsidiary rights. *See* Marks, *Subsidiary*

Rights and Permissions, supra at 232; see also, District Court Finding of Fact 41, 67 & 557 F. Supp. at 1072 n.11; *cf. Roy Export Co. v. Columbia Broadcasting System, Inc.,* 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd,* 672 F.2d 1095 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 60 (1983) (harm to original work flowing from inability to protect derivative work). The District Court properly refused to allow Respondents to dictate Petitioners' publishing judgment. *See* District Court Finding of Fact 41 & 557 F. Supp. at 1072 n.11; *cf. New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.,* 215 U.S.P.Q. 755, 757 (D. Mass 1981) ("It is for plaintiffs, not defendant, to determine when and in what manner they choose to exploit their copyright.")

A copyright owner clearly has the right to protection against unauthorized use of its work and actual or potential injury in any significant market, primary or subsidiary. *Iowa State University Research Foundation, Inc. v. American Broadcasting Co., Inc.,* 621 F.2d 57, 62 (2d Cir. 1980); *New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.,* 215 U.S.P.Q. 755, 757 (D. Mass. 1981); *Marvin Worth Productions v. Superior Films Corp.,* 319 F. Supp. 1269 (S.D.N.Y. 1970). Thus, usurpation of the right of first publication commonly cannot qualify as fair use, and Respondents' actions cannot do so here.

The Court of Appeals majority accorded the shield of lawful privilege, and the colloquial respectability of "fairness," to the knowing appropriation of substantial portions of literary expression from a clandestinely delivered manuscript that was about to be published, and to the deliberate use of such material to destroy Petitioners' right of first publication. The failure of the Court of Appeals to consider the unpublished nature of Petitioners' work, and its holding of fair use under the circumstances of this case, are a substantial threat to the order and integrity of the publishing process itself, as well as to the economic interests of authors and publishers and, derivatively, the interests of the public. In *Sony Corporation of America v. Universal City Studios, Inc.,* ____U.S.____, 104 S. Ct. 744, 792, 795, *reh'g denied,* 104 S. Ct. 1619 (1984), this Court recently

confirmed that, at bottom, the doctrine of fair use is an "equitable rule of reason." Both equity and reason compel reversal here.

II. The Court of Appeals Erred in Permitting Extensive Paraphrasing of Expression

It is an established and essential principle of copyright law that the mere avoidance of verbatim duplication of expression will not immunize a defendant from infringement. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (L. Hand, J.), *cert. denied*, 282 U.S. 902 (1931) ("It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text else a plagiarist would escape by immaterial variations."). The Court of Appeals, while paying lip service to this general rule, nevertheless effectively negated its practical application by limiting it to situations where "an alleged infringer *borrow*[*s*] *virtually an entire work* and attempt[s] to avoid liability by doing little more than changing the verbatim language or slight details . . .," and where "*all of* [*a*] *book* or *all of a chapter* [are taken and the infringer] merely change[s] the language here and there. . . ." 723 F.2d at 203 (emphasis added).

This limitation on protection from paraphrasing of expression is contrary to prior case law. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4, 901) (Story, J.); *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965). It is inherently inconsistent with basic principles of copyright.[12]

[12] A conclusion of copyright infringement requires only a finding of substantial appropriation. Moreover, even quantitatively small takings may amount to infringement if the matter taken is qualitatively substantial. *E.g., Iowa State University Research Foundation, Inc. v. American Broadcasting Co., Inc.*, 621 F.2d 57 (2d Cir. 1980).

Although the Court of Appeals sought to justify its conclusion by reliance on the factual nature of Petitioners' work and First Amendment considerations, the interests of free speech do not require such a restriction in this case. Paraphrasing, as a form of copyright infringement, is merely a more adroit form of copying *expression* than literal repetition. The First Amendment does not require the free use of an author's expression, whether it be taken from the whole or any substantial part of a work.[13] *See Iowa State University Research Foundation, Inc. v. American Broadcasting Co., Inc.* 621 F.2d 57, 61 (2d Cir. 1980); *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); *New Boston Television, Inc. v. Entertainment Sports Programming Network Inc.*, 215 U.S.P.Q. 755, 757 (D. Mass. 1981).

The publication of autobiographies, biographies, histories, and like fact works is an invaluable contribution to the democratic "harvest of knowledge." A great deal of information would not be part of the public consciousness but for publishers' acceptance of the investments and risks of publication. Copyright provides the security and promise that justifies such undertakings. Publishers regularly license under copyright the use of substantially less than entire works. This Court should not confirm a standard of infringement that will encourage non-literal appropriation of expression and eviscerate meaningful copyright protection of commercially significant, but limited, portions of expression taken in near-literal form from larger works.

[13] An exceptional case might arise in which the information sought to be conveyed and the manner of its expression are so intertwined that the one cannot be communicated without the other. *See Roy Export Co. v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 80 (1983). In such a circumstance, it may well be that the interests of copyright would have to be subordinated to overriding First Amendment concerns. But no such situation is presented here, since it cannot seriously be argued that whatever newsworthy information was sought to be conveyed by the Nation article—e.g., relating to the Nixon pardon—had to have taken the form of literal or near-literal copying of President Ford's own words.

CONCLUSION

The Court of Appeals erred in defining the scope of protection of Petitioners' work and by applying fair use to its unpublished manuscript. Its decision should be reversed.

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No.83-1632

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—vs.—

NATION ENTERPRISES and
THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR VOLUNTEER LAWYERS FOR THE ARTS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, HARPER & ROW, PUBLISHERS, INC. AND THE READER'S DIGEST ASSOCIATION INC.

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AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS,
HARPER & ROW, PUBLISHERS, INC. AND
THE READER'S DIGEST ASSOCIATION, INC.

Volunteer Lawyers for the Arts, Inc. ("VLA") submits this brief amicus curiae in support of petitioners, Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. All parties to this suit have given written consent to the filing of this brief amicus curiae.

INTEREST OF THE AMICUS

VLA is a nonprofit organization that provides, and arranges for, free legal services to artists and non-profit arts organizations otherwise unable to afford such services.[1]

VLA's clients include individual creators such as authors, dramatists, composers, lyricists, choreographers, painters, visual artists, and photographers. These clients create copyrighted works and sell the rights of first publication of their works.

In addition, VLA's clients, whatever their field, are working artists whose livelihoods depend not only on their ability to sell the rights of first publication of their works, but also on their reputations and integrity as artists.

The Court of Appeals majority, in an unprecedented decision, ruled below that a commercial magazine which knowingly received a purloined *unpublished* copyrighted work could nevertheless substantially appropriate and publish that work, without the author's consent, under the guise of "*fair* use."

We believe that use was blatantly *unfair*. If the holding below stands, VLA's clients, and every other creator, would be at serious risk. A creator's right of first publication of his work would be seriously jeopardized. That right is not merely of economic value. An artist's reputation and integrity depend in part on his control over whether, and under what circumstances, he will make his work public. The publication of an

[1] VLA is licensed to practice law in the State of New York. It has a roster of almost 800 volunteer attorneys who provide free legal representation to clients meeting VLA's income qualifications.

unfinished draft—whether rough or polished—of an artist's work could destroy his reputation and integrity.

The majority decision below, by condoning defendants' attempt to "scoop President Ford on his own memoirs," not only does damage to plaintiffs' copyright, but threatens both the economic rights and integrity of all authors. Should defendants be entitled to publish a stolen, unfinished draft of a Rauschenberg painting, on the grounds that doing so somehow reveals something "newsworthy?" Or an unfinished score by Stephen Sondheim? Or an unfinished play by Arthur Miller? Or the unpublished diary of a Justice of this Court?

If the majority opinion does not allow such chicanery in all cases, it at least opens the door to it. We respectfully suggest that door should be shut, by reversal of the decision below.

ARGUMENT

"Fair Use" of Unpublished Materials, If It Exists at All, Requires An Extraordinary Fact Situation Not Present Here

We suggest that the unpublished nature of President Ford's manuscript is the hinge on which this case should turn.[2] No court has found an unauthorized use of unpublished copyrighted materials to be a "fair use." The author's consent has always been required. The basis for the author's virtually absolute right of first publication goes back to the earliest days of copyright.

At common law, in England and the United States, the author owned an absolute right to the first

[2] It is ironic that the very President who signed the 1976 Copyright Act into law should be victimized by an erroneous interpretation of that law.

publication of his work. He could determine the conditions under which it was made public. If he wished, he need not make it public at all:

> Every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends. In that state the manuscript is, in every sense, his peculiar property; and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property.

Millar v. *Taylor,* 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.). See also, *Donaldson* v. *Becket,* 4 Burr. 2408, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (1774 H.L.); *Wheaton* v. *Peters,* 33 U.S. (8 Pet.) 591 (1834).

This absolute prohibition was not merely grounded in the author's economic property right to his work, important though that is. It was also grounded in a quasi-privacy right, to prevent an unlawful intrusion into the artist's innermost feelings, and the concomitant damage that would result to his reputation if his unfinished works, or works never intended for public consumption in any form, were made known without his consent.

This basis for the right of first publication was best expressed in a fascinating British case, *Prince Albert* v. *Strange,* High Court of Chancery, 2 DeG. & Sm. 652, 64 Eng. Rep. 293, 79 Rev. Rep. 307, *aff'd* 1 Mac. & G. 25, 41 Eng. Rep. 1171 (1849). Queen Victoria and Prince Albert had created etchings for their own and their friends' amusement. The defendant came into possession of copies which he knew were obtained without consent,

described them in a catalogue, and offered them for sale.

As a matter of copyright law, the court enjoined the defendant's actions, because the artists' economic interest and integrity would be jeopardized by unauthorized publication:

> It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial to him; nor would it be difficult to suggest other examples.

64 Eng. Rep. at 309.

And, the court concluded, the treatment of unpublished works therefore differed from published works. Published works could sometimes be used without the author's consent (as under the modern doctrine of fair use); unpublished works could not:

> A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analysed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

64 Eng. Rep. at 311.

American cases dealing with the unauthorized publication of unpublished materials—even by newspapers in the course of their news reporting—have followed this rule. *Press Pub. Co.* v. *Monroe,* 73 Fed. 196 (2d Cir.), *aff'd,* 164 U.S. 105 (1896); *Baker* v. *Libbie,* 210 Mass. 599, 97 N.E. 109 (1912); *Stanley* v. *Columbia Broadcasting Sys., Inc.,* 35 Cal.2d 653, 221 P.2d 73 (1950) ("The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right, and the common law right is perpetual, existing until lost or terminated by the voluntary act of the owner, . . . while a statutory copyright permits a 'fair use' of the copyrighted publication, without deeming it an infringement." 221 P.2d at 78, quoting from 18 C.J.S., Copyright and Literary Property, sec. 2, p.138 et seq.); *Fendler* v. *Morosco,* 253 N.Y. 281, 171 N.E. 56 (1930) ("We are not now considering whether the defendant Tully made a fair use of plaintiff's play. Since plaintiff had not published or produced her play, perhaps any use that others made of it might be unfair." 253 N.Y. at 291.)

The 1976 Copyright Act, of course, pre-empted state common law protection and extended Federal statutory protection to all unpublished works. 17 U.S.C. Secs. 301, 303. But no change was made in the preexisting law of fair use. While previous decisional law was codified in 17 U.S.C. Sec. 107, that codification was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." S. Rep. No. 94-473, 94th Cong., 1st Sess., 62 (1975); H. Rep. No. 94-1476, 94th Cong., 2d Sess., 66 (1976).[3]

[3] The Senate Report discussed fair use of unpublished materials only in the context of classroom teaching, and not for the commercial, profit-making purposes at issue here. Even for non-profit classroom purposes, only the most extraordinary circumstances would justify fair use of unpublished materials:

> The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's "right of first publication" would outweigh any needs of reproduction for classroom purposes

S. Rep. 94-1476, at 64.

Note also that Congress was especially solicitous of authors' rights in unpublished materials in other circumstances. Thus, the compulsory license for public broadcasters' uses of copyrighted nondramatic musical, and pictorial, graphic and sculptural works, extends only to *published* works. 17 U.S.C. Sec. 118(b).

The extraordinary circumstances which would justify a finding of fair use of unpublished materials—circumstances which evidently have never been found before—are certainly not present here. President Ford's manuscript was to be published in only a few weeks, and he was still making changes in it. There was no compelling need to reveal it before its publication—all of the "revelations" defendants found so "newsworthy" had in fact been revealed in public documents before. Defendants did not know those "revelations" had previously been made public because, in their rush to "scoop President Ford on his own memoirs," the research was slipshod. And, most telling, defendants knew that the galley proof they acquired was, to put it bluntly, stolen.

Fair use is an equitable doctrine. S. Rep. No. 94-473, at 62; H. Rep. No. 94-1476, at 65. It requires "good faith and fair dealing." *Time, Inc.* v. *Bernard Geis Associates*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968). Perhaps inevitably, those who would publish unpublished materials without authorization come to court with unclean hands because they have obtained the materials, directly or indirectly, by nothing more than

common theft: *See, e.g., Press Pub. Co.* v. *Monroe, supra*[4]; *Atlantic Monthly* v. *Post Pub. Co.*, 27 F.2d 556 (D.Mass 1928); *Prince Albert* v. *Strange, supra.* Defendants here should not benefit from their dealing in bad faith.

The Court of Appeals' holding is contrary to the Copyright Law and sound public policy. It should be reversed.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[4] The court there noted with strong disapproval the type of defense interposed here—that a journalist's judgments as to what was newsworthy superseded all rights of others:

> The managing editor [of the defendant's newspaper] testified "Under some circumstances, I believe that I have the right, as an editor, to publish the manuscript of a person without that person's consent." This is a restatement of the proposition so frequently advanced, when newspapers happen to be defendants, that the person or property rights of individuals are entitled to receive no consideration at the hands of the public press whenever a violation of those rights may, in the opinion of the editor, promote the entertainment of the purchasers of his paper.

73 Fed. at 200.

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JOINT APPENDIX
(Volume I — Pages JA-1-JA-358)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants

----------X

Relevant Docket Entries

2-13-80 Filed complaint and issued summons.

6-2-80 Filed Pltffs' Amended Complaint.

8-4-80 Filed ANSWER for defts.

10-23-80 Fld memo & order the second & third countd of the amended complaint dismissed OWEN J m/n.

1-25-82 NON JURY TRIAL begun 1-25-82; trial continued dated 1-26, 27,

28, Adj. to 2-23-81 at 2:00p.m. Trial continued & concluded on Decision by Judge D/R.....

2-17-83 Filed OPINION & ORDER 54286 Given the foregoing, I conclude that the Nation has infringed the pltffs' copyright without justification. The pltffs are awarded the $12,500 they were damaged by Time's non-performance, & such further amts. as may be found to be profits in an accounting before a Magistrate of this Court who shall hear & report thereon. Pltffs are awarded costs & disbursements. Attnys' fees are denied. In addition to the foregoing findings of fact & conclusions of law, the pltffs' heretofore-submitted detailed findings & conclusions are

herewith signed. So Ordered Owen, J. m/n

2-17-83 Filed MEMO ENDORSED, The fact that certain proposed findings herein are excised etc. as so indicated. So ordered Owen, J. m/n

2-18-83 Filed MEMORANDUM & ORDER, this case is referred to Mag. Sinclair to hear & report etc. So ordered Owen, J. copy sent to Mag.

3-1-83 Filed ORDER, after a trial before Owen, J. a finding of defts' liability for copyright infringement & an initial award of damages in the amt of $12,500. See opinion & Order of Owen, J. dated 2-16-83. A hearing on damages shall be held in this Courthouse on 3-16-83 at

9:30a.m. etc. Mag. Sinclair. m/n

3-16-83 Filed stip and order that pltff waive their right as determined by the Dist. court to recover profits of the defts in this action, further agreed that the accounting ordered by Owen, J. by order dated 2-17-83 & scheduled by Mag. Sinclair for 3-16-83 by order dated 3-2-83 is rendered moot. So ordered Owen, J.

4-5-83 Filed JUDGEMENT, #83,0511- Ordered that the pltffs. have judgt. in the sum of $12,500., as against the defts. with costs & disbursements to be taxed by the Clerk..Ordered that attny's fees be denied. - Clerk.....ent. 4-6-83. m/n

4-8-83 Filed pltffs' NOTICE OF APPEAL to the USCA for the Second Circuit from the pltff. Judgt. ent. on 4-5-83 insofar as it awards $12,500 in damages with costs & disbursements to be taxed by the clerk...m/n to Esq., Edward A. Miller, Esq. on 4-8-84..

4-22-83 Filed pltff. The Reader's Digest Assoc. Inc.'s NOTICE OF CROSS APPEAL to the USCA FOR THE Second Circuit from 1/ only so much of the final judgt. on 405083 2/ also the Order dated 4-21-80 & ent. 10-23-80 to the extent it dismissed the second & third counts of pltffs' amended complt. etc. m/ copies to Cahill, Gordon & Reindel; Andrew L. Deutsch Esq.; Am. Civil

Liberties Union; Leon Friedman,

Esq.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Relevant Docket Entries

9-14-83 Case Argued Before: Kaufman, Meskill, Pierce, C.JJ.

11-17-83 Judgement reversed in part, affirmed in part by published signed opinion, Kaufman, CJ

11-17-83 Dissenting signed opinion per Meskill, CJ

11-17-83 Judgement filed.

12-1-83 Appellees Harper and Row et al., petition for rehearing with a suggestion for rehearing in banc filed. (w/pfs)

1-4-84 Order denying appellees Harper and Row et al., petition for rehearing with a suggestion for rehearing in banc filed.

6-4-84 Certified copy of order from Supreme Court granted writ of certiorari to the United States

Court of Appeals for the Second Circuit filed. (S.C.# 83-7277 & 83-7327)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants

----------X

Amended Complaint

Plaintiffs by their respective attorneys, Edward A. Miller and Cowan, Liebowitz & Latman, P.C., for their complaint against defendants allege:

Jurisdiction and Parties

1. This action arises under the Copyright Act of 1976, 17 U.S.C. §1338(b). Venue arises under 28 U.S.C. §§1391(b) and 1400.

2. Plaintiff Harper & Row, Publishers, Inc. (sometimes hereafter "Harper & Row") is a New York corporation with its principal place of business at 10 East 53rd Street, New York, New York.

3. Plaintiff The Reader's Digest Association, Inc. (sometimes hereafter "Reader's Digest") is a Delaware corporation with its principal place of business in the Town of New Castle, New York.

4. Upon information and belief, defendant Nation Enterprises is a New York limited partnership with its principal place of business at 72 Fifth Avenue, New York, New York.

5. Upon information and belief, defendant Nation Associates, Inc. is a New York corporation with its primary place of business at 72 Fifth Avenue, New York, New York.

Facts

6. Plaintiff Harper & Row has been a leading publisher of books and journals in the United States and elsewhere in the world for more than 160 years. In 1979 it published under its various imprints in hardcover and paperback editions more than 1,000 books of every variety, including major works of fiction, history, biography and current affairs.

7. Plaintiff Reader's Digest is the publisher of the magazine Reader's Digest which has been published for over 57 years. It is now published and distributed worldwide in 15 languages in 163 countries. Plaintiff Reader's Digest is also the publisher of condensed books, general books, trade books, educational materials, phonograph records and audio tapes.

8. Upon information and belief, defendants are the publishers of the weekly magazine The Nation.

9. On or about February 28, 1977 plaintiffs Harper & Row and Reader's Digest entered into an agreement with former President Gerald R. Ford (the "Author-Publisher Agreement") to publish his memoirs, including his experiences as Vice President and President of the United States (the "Memoirs"). The Author-Publisher Agreement granted Harper & Row and Reader's Digest the exclusive rights to publish the Memoirs in book form in the United States and to license publication of the Memoirs (as well as adaptations and condensations thereof) in newspapers and periodicals before publication in book form.

10. It was agreed that the Memoirs would be 150,000 to 175,000 words in length and deal in part with the

resignation of President Nixon, his subsequent pardon and President Ford's reflections and recollections on this period of history and other matters. The parties also agreed that reasonable efforts would be made to preserve the contents of the Memoirs in confidence until first publication.

11. In accordance with the Author-Publisher Agreement President Ford completed preparation of the Memoirs and delivered the typewritten manuscript (the "Unpublished Manuscript") to plaintiffs in or about February 1979.

12. By agreement dated march 14, 1979 and pursuant to the Author-Publisher Agreement, plaintiffs sold to Time Inc. the exclusive license to publish, before any book publication, in the United States and Canada edition of Time magazine selections from chapters 1 and 3 of the Unpublished Manuscript (by then

entitled "A Time To Heal"). These chapters deal with President Ford's description and interpretation of the periods covering President Nixon's resignation and pardon. Time, Inc. was licensed to publish such selections only in its April 23, 1979 issue to be on sale April 16, 1979. Plaintiffs also agreed there would be no other authorized publication in the United States or Canada of any portion of the Unpublished Manuscript prior to April 23, 1979. It was further agreed that any publication of material from chapters 1 and 3 before the publication by Time magazine would require plaintiffs to renegotiate a $12,500 final payment due to plaintiffs on April 16, 1979.

13. By agreement dated march 14, 1979 and pursuant to the Author-Publisher Agreement, plaintiffs sold to Reader's Digest for $35,000 the exclusive license

to publish, before any book publication, in the English Language in the United States and Canada editions of its magazine Reader's' Digest selections from chapters 1 and 3 of the Unpublished Manuscript. Plaintiff Reader's Digest was licensed to publish such selections only in its May 1979 issue to be on sale April 24, 1979. Plaintiffs also agreed not to authorize any further publication in the United States and Canada of any portion of the then Unpublished Manuscript until May 28, 1979, except for the selections licensed for publication in the Time magazine edition to be on sale April 16, 1979 and the planned shipment to book stores on or after April 25, 1979 of the hardcover book edition of the previously Unpublished Manuscript entitled A Time To Heal (the "Book").

14. In or about April 1979, defendants, without the authorization of

either plaintiff, obtained possession of a copy of the Unpublished Manuscript and copies substantial portions thereof in preparing an article entitled "The Ford Memoirs, Behind The Pardon" (hereafter the "Infringing Article"), a copy of which is attached as Exhibit A. Defendants published the Infringing Article in the April 7, 1979 issue of The Nation.

15. Defendants' Infringing Article is copied from the Unpublished Manuscript and is substantially similar to significant portions thereof.

16. As a result of the April 7, 1979 publication of the Infringing Article, Time, Inc. cancelled its proposed publication of selections from chapters 1 and 3 of the Unpublished Manuscript and has refused to pay to plaintiffs the $12,500 payment due on April 16, 1979.

17. The Unpublished Manuscript is an original work of authorship for which copyright protection subsists under the Copyright Act.

18. Copyright registration for the Unpublished Manuscript was obtained in accordance with Section 411 of the Copyright Act from the United States Register of Copyright on August 24, 1979 (Certificate No TXu 26-776). Copies of this certificate of registration and of related supplementary registration (Certificate No CA TXu 42-204) are attached as Exhibit B.

19. Plaintiffs have duly recorded in the U.S. Copyright Office in compliance with Section 205(d) of the Copyright Act, the instruments of transfer under which they claim to be the owners of the exclusive rights granted to them in the Author-Publisher Agreement and granted to plaintiff Reader's Digest

in the above license agreement dated March 14, 1979 between the plaintiffs as licensor and plaintiff Reader's Digest as licensee.

20. By virtue of the Author-Publisher Agreement and the instrument of transfer with respect to the rights covered by that agreement and the instrument of transfer with respect to the rights covered by that agreement plaintiffs are the joint legal owners of the exclusive right, among others, under such copyright to license the publication of the Unpublished Manuscript in a newspaper or periodical prior to book publication. Plaintiffs are, therefore, entitled under Section 501(b) of the Copyright Act to institute this action for infringement of that right.

22. On or about June 6, 1979 plaintiffs, pursuant to the Author-Publisher Agreement, published the

Book under their joint imprint. Plaintiffs have duly complied with all of the requirements of the Copyright Act, including the statutory notice, registration, deposit and manufacturing provisions. Copies of the Book were manufactured in the United States by Tri Star Graphics and Fairfield Graphics at Minneapolis, Minnesota and Fairfield, Connecticut, respectively.

First Count

23. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 22.

24. At all relevant times, plaintiffs, as the owners of the exclusive publishing rights granted to them were the copyright owners of such rights under Sections 101 and 201(d) (2) of the Copyright Act.

25. As such copyright owners, plaintiffs at all relevant times have

possessed the exclusive rights under Section 106(1) (2) and (3) of the Copyright Act: (1) to reproduce the copyrighted Unpublished Manuscript in copies; (2) to prepare derivative works such as condensations and adaptations for pre-book publication serialization based on the Unpublished Manuscript and (3) to distribute copies of such works to the public by sale.

26. Defendants by publishing the Infringing Article, which was copied from and is substantially similar to significant portions of the Unpublished Manuscript, within the meaning of Section 501 of the Copyright Act have infringed such exclusive rights of plaintiffs as copyright owners with respect to the Unpublished Manuscript.

27. Defendants' actions have damaged plaintiffs by violating the exclusive rights granted to them under

the Copyright Act pursuant to Article I, Section 8, Clause 8 of the U.S. Constitution.

Second Count

28. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 22.

29. With full awareness that they were not legally authorized by plaintiffs to possession of the typescript or a copy of the typescript of the Unpublished Manuscript, or to access to its contents, defendants wrongfully obtained possession thereof, and converted the Unpublished Manuscript to their own use in violation of plaintiffs' rights by publishing the Infringing Article in their magazine The Nation. Defendants did so with full awareness of the above contractual arrangements with Time and Reader's Digest magazines and

the plaintiffs' publication schedule for the Memoirs.

30. Plaintiffs have been damaged by defendants' aforesaid conduct.

Third Count

31. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 22.

32. Upon information and belief, defendants at all relevant times were aware of the above contractual arrangements with Time and Reader's Digest magazines, the plaintiffs' publication schedule for the Memoirs and the unpublished state of the typescript manuscript upon which the Infringing Article was based.

33. Defendants in publishing the Infringing Article knowingly amd wrongfully interfered with the existing contractual rights and advantageous

relationships of the plaintiffs without reasonable justification or excuse, in particular by destroying the exclusive right of an author and his licensed publishers to exercise and enjoy the benefit of the pre-book publication serialization rights.

34. Defendants have damaged plaintiffs in their contractual and advantageous relationships.

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(a) With respect to the First Count, the Court should award to plaintiffs the actual damages caused by defendants' copyright infringement as well as any additional profits of the defendants attributable to such infringement;

(b) With respect to the Second and Third Counts, the Court should award to plaintiffs the actual damages caused

by such tortious conduct as well as any additional profits of the defendants attributable to such tortious conduct; and

(c) The Court should award to plaintiffs their costs, as well as reasonble attorney's fees and such other and further relief as may be just.

Dated: New York, New York
May 7, 1980

EDWARD A. MILLER, ESQ.
Attorney for Plaintiff Harper & Row, Publishers, Inc.
10 East 53rd Street
New York, New York 10022

COWAN, LIEBOWITZ & LATHAM, P.C.

By_____
A Member of the Firm
Attorneys for Plaintiff The Reader's Digest Association, Inc.
605 Third Avenue
New York, New York 10016

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Defendants

----------X

Answer to Amended Complaint

Defendants Nation Enterprises and The Nation Associates, Inc. by their attorneys, Cahill Gordon & Reindel and Bruce J. Ennis, answer the Amended Complaint herein as follows:

1. Admit that plaintiffs allege that this action purportedly rises under the Copyright Act of 1976, 17 U.S.C. §101 et seg., 28 U.S.C. §1338(a) and-jurisdiction pendent thereto, admit that

plaintiffs assert claims of conversion and wrongful interference with contractual rights joined with a purportedly substantial and related claim under the Copyright Act pursuant to 28 U.S.C. §1338(b), admit that plaintiffs state that venue herein purpotedly arises under 28 U.S.C. §§1391(b) and 1400, and except as so admitted, deny the allegations contained in Paragraph One of the Amended Complaint.

2. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Two of the Amended Complaint.

3. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Three of the Amended Complaint.

4. Admit the allegations contained in Paragraph Four of the Amended Complaint.

5. Admit the allegations contained in Paragraph Five of the Amended Complaint.

6. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Six of the Amended Complaint.

7. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Seven of the Amended Complaint.

8. Deny the allegations contained in Paragraph Eight of the Amended Complaint, except admit that Nation Enterprises is the publisher of The Nation magazine.

9. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Nine of the Amended Complaint.

10. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Ten of the Amended Complaint.

11. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Eleven of the Amended Complaint.

12. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twelve of the Amended Complaint.

13. Deny knowledge and information sufficient to form a belief

as to the truth of the allegations contained in Paragraph Thirteen of the Amended Complaint.

14. Admit that, without the authorization of plaintiffs, Nation Enterprises published an article entitled "The Ford Memoirs, Behind the Pardon", in the April 7, 1979 issue of The Nation, refer to said article for the contents thereof, and, except as so admitted, deny the allegations contained in paragraph Fourteen of the Amended Complaint.

15. Deny the allegations contained in Paragraph Fifteen of the Amended Complaint.

16. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Sixteen of the Amended Complaint.

17. Deny knowledge and information sufficient to form a belief

as to the allegations contained in Paragraph Seventeen of the Amended Complaint.

18. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Eighteen of the Amended Complaint

19. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Nineteen of the Amended Complaint.

20. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty of the Amended Complaint.

21. Deny knowledge and information sufficient to form a belief as to the truth of the allegations

contained in Paragraph Twenty-one of the Amended Complaint.

22. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty-two of the Amended Complaint.

23. In answer to Paragraph Twenty-three of the Amended Complaint, defendants Nation Enterprises and the Nation Associates, Inc. repeat and reallege the admissions, denials, and averments contained in Paragraphs 1 through 22 hereof.

24. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph Twenty-four of the Amended Complaint.

25. Deny knowledge and information sufficient to form a belief as to the truth of the allegations

contained in Paragraph Twenty-five of the Amended Complaint.

26. Deny the allegations contained in Paragraph Twenty-six of the Amended Complaint.

27. Deny the allegations contained in Paragraph Twenty-seven of the Amended Complaint.

28. In answer to Paragraph Twenty-eight of the Amended Complaint, defendants Nation Enterprises and the Nation Associates, Inc. repeat and reallege the admissions, denials and averments contained in Paragraphs 1 through 22 hereof.

29. Deny the allegations contained in Paragraph twenty-nine of the Amended Complaint.

30. Deny the allegations contained in Paragraph Thirty of the Amended Complaint.

31. In answer to Paragraph Thirty-one of the Amended Complaint, defendants Nation Enterprises and The Nation Associates, Inc. repeat and reallege the admissions, denials and averments contained in Paragraphs 1 through 22 hereof.

32. Deny the allegations contained in Paragraph Thirty-two of the Amended Complaint.

33. Deny the allegations contained in Paragraph Thirty-three of the Amended Complaint.

34. Deny the allegations contained in Paragraph Thirty-four of the Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

35. The Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

36. The claims alleged in the Amended Complaint are barred by reason of laches.

THIRD AFFIRMATIVE DEFENSE

37. Gerald R. Ford and Trevor Armbrister are indispensable parties to this action and have not been joined herein as party plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

38. The claims alleged in the Amended Complaint are barred by reason of the First Amendment to the Constitution.

FIFTH AFFIRMATIVE DEFENSE

39. The claims alleged in the First Count of the Amended Complaint are barred by the doctrine of fair use, both as judicially developed and as provided

by the Copyright Act of 1976, 17 U.S.C.§ 107.

SIXTH AFFIRMATIVE DEFENSE

40. The Second and Third Counts of the Amended Complaint are preempted by the Copyright Act of 1976, 17 U.S.C. §301.

SEVENTH AFFIRMATIVE DEFENSE

41. The Second and Third Counts of the Amended Complaint are preempted by reason of the Copyright and Supremacy Clauses of the Constitution, Article I, cl. 8, §7, Article VI, §2.

EIGHT AFFIRMATIVE DEFENSE

42. All portions of the "Unpublished Manuscript" referred to in the Amended Complaint and allegedly copied, quoted or paraphrased in the allegedly "Infringing Article" are not

within the subject matter of copyright either as defined by the Copyright Clause to the Constitution, or as defined in the Copyright Act of 1976, 17 U.S.C. §102(b).

NINTH AFFIRMATIVE DEFENSE

43. All portons of the "Unpublished Manuscript" allegedly copied, quoted or paraphrased in the allegedly "Infringing Article" are works of the United States Government within the meaning of the Copyright Act of 1976, 17 U.S.C. §105, and are consequently not entitled to copyright protection.

TENTH AFFIRMATION DEFENSE

44. All, or substantially all, of the portions of the "Unpublished Manuscript" allegedly copied, quoted, or paraphrased in the allegedly "Infringing Article" are the same as or substantially similar to documents and other material

in which Gerald R. Ford disclaimed all exclusive literary rights pursuant to a letter agreement dated December 13, 1976, by which Ford donated said documents and other material to the United States of America; copyright in said portions of the "Unpublished Manuscript" is therefore not vested in, assigned to, transferred to or owned by plaintiffs.

ELEVENTH AFFIRMATIVE DEFENSE

45. All, or substantially all, of the portions of the "Unpublished Manuscript" allegedly copied, quoted or paraphrased in the allegedly "Infringing Article" were in the public domain in the same or in substantially similar form before April 7, 1979.

TWELFTH AFFIRMATIVE DEFENSE

46. All, or substantially all, of the portions of the "Unpublished

Manuscript" allegedly copied, quoted, or paraphrased in the allegedly "Infringing Article" was work prepared, authored or created by Trevor Armbrister which as not "work made for hire" within the meaninf of the Copyright Act of 1976, 17 U.S.C. §§ 101, 201(b), and ownership of the copyright therein or all or some of the exclusive literacy rights comprised in the copyright therein were not transferred to plaintiffs.

THIRTEENTH AFFIRMATIVE DEFENSE

47. Plaintiffs' demand for reasonable attorneys' fees is barred by the Copyright Act of 1976, 17 U.S.C. § 412.

WHEREFORE, defendants Nation Enterprises and The Nation Associates, Inc., demand that judgement be entered in their favor:

(a) dismissing the Amended Complaint herein with prejudice;

(b) awarding them the costs of this action and reasonable attorneys' fees; and

(c) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 1, 1980

CAHILL GORDON & REINDELL

By _____
A Member of The Firm
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(212) 825-0100

_____
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Attorneys for Defendants
Nation Enterprises and
The Nation Associates, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Plaintiffs,

-against-

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Defendants

----------X

Judgement of United States
District Court for the Southern
District of New York, entered
April 5, 1983

The first count in the above entitled action having been brought on for trial before the Honorable Richard Owen, United States District Judge without a jury on January 25, 1982, and at the conclusion of the trial the Court having reserved its decision; and the Court thereafter on February 17, 1983, having handed down its Opinion and Order

awarding the plaintiffs $12,500.00., with costs and disbursements and denying attorney's fees; and the Court on February 18, 1983, having handed down its memorandum and order referring this case to Magistrate Kent Sinclair, Jr. to hear and report on such further amounts as may be found to be profits in accounting in addition to damages awarded to plaintiffs; and a stipulation and order having been filed on March 16, 1983, rendering the accounting ordered by Judge Owen moot, it is,

HARPER & ROW PUBLISHERS INC., et

ano -vs-

NATION ENTERPRISES, ET ANO -80

Civil 856 (RO)

ORDERED, ADJUDGED AND DECREED:

That the plaintiffs have judgement in the sum of $12,500.00., as against the defendants with costs and disbursements

to be taxed by the Clerk, and it is further,

ORDERED: That attorney's fees be and they are hereby denied.

DATED: NEW YORK, N.Y.
April 5, 1983

Raymond T. Burghaidt
Clerk

TRIAL TRANSCRIPT*

[Cross-Examination of Irwin Glikes] [173]

Q Was it your understanding that "A Time to Heal" would contain unique information with respect to the pardon of Nixon not before disclosed?

A We hoped that it would, though we had a pretty clear understanding that it would be the President's words and interpretations of those events that was likely to be unique because most of the book was in the public record.

Q You understood that from the beginning, did you?

A Well, there were conversations with the agents, endless conversations

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* Pursuant to Supreme Court Rule 30.3, the original page numbers of the transcript have been inserted in brackets where appropriate.

with the agents and the President's representatives, and among those conversations it was clear, and if I remember correctly that language got into -- the results of those discussions got into the proposal that the book would be within -- the book would be the President's recollection of those events and would very much be within his definition of propriety of good taste in a President's memoirs. So we were told, and it was understood, there were not going to be any sensational revelations; it was primarily going to be the President's memoirs of his thoughts and feelings of the events he participated in.

Q Yesterday there was introduced in evidence [174] Plaintiffs' Exhibit 5, which was the letter you wrote to

Mr. Laster of the William Morris Agency on February 22, 1977.

* * *

[176]

Q You have in front of you Plaintiffs' Exhibit 5.

A I do.

Q This was a document written by you, is it not?

A Yes.

Q It was written to Mr. Laster of the William Morris Agency?

A Yes.

Q In it you ask for the right to publish President Ford's book, is that right?

A Yes.

Q Could you direct your attention to the last page of the document;

and particularly the first paragraph. Let me read it to you. It says "The authors, Gerald Ford and Trevor Armbrister." Let me pause for a moment there. At that time was Mr. Armbrister considered to be a co-author of the book?

A No.

Q "The authors, Gerald Ford and Trevor Armbrister, propose a manuscript of approximately 150,000 to 175,000 words, the major portion of which will describe in close [177] personal terms Mr. Ford's experiences when he became Vice President and then President of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about, one, Mr. Ford's relationship with former President Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; two, the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and, three, Mr. Ford's reflections on this period of history, and the morality and personalities involved."

Was that a fair statement of what you intended the book to be?

A Yes.

Q And is it what the book was, in your view?

A Yes.

Q You testified earlier briefly, and I didn't finish my questions about it, about the reminder given to President Ford not to breach his obligations to Harper & Row. Do you know if President Ford was told in words or substance that he ought not to appear on an NBC television program to discuss the pardon?

MR. ZISSU: Objection, unless the witness was part of those discussions. Unless he was a witness [178] or observed the communication that would be hearsay as to what he may have heard.

THE COURT: Do you want to lay a foundation?

MR. ABRAMS: It doesn't sound like the same side from a moment ago.

Q You were in charge, Mr. Glikes, of the publication of the book, is that right?

A Yes.

Q Of the publicity with respect to the book?

A In a supervisory way.

Q In a supervisory way of making sure that President Ford adhered to his contract with Harper & Row?

A Yes.

Q My question to you is whether you have any knowledge of President Ford being advised by Harper & Row not to appear on an NBC television program to

talk about the pardon of President Nixon.

MR. ZISSU: You see, your Honor, the basis for the objection is there is testimony, and there will be testimony, from the former President, as to how he was informed of things. As I understand it, it came directly through his literary agents or Dean Burch, who was his lawyer. Mr. Glikes, as far as I understand his testimony, was not even the person who communicated [179] directly with either of those two persons, and, therefore, it is a kind of a chain. I mean, if the question is whether he has some knowledge that there was a communication to either Mr. Burch or to the literary agents, that is one question, but to ask the question of what was

communicated to former President Ford takes a second link in that chain.

Q Let me ask the first link. What do you know as you sit here today of what was communicated to President Ford, and by whom?

A I know only a part of it. The part I directly know about is my expressing my concern to a member of the Harper & Row legal department about possible violations of our contract by such a TV program.

Q What were you concerned about?

A That this might happen before we published and thereby be in breach of our contract.

Q What kind of things were you concerned about that President Ford might disclose?

A I thought that he might on television tell some of the stories about how he felt and what he thought while the pardon was going on, that he might express his views about personalities, that he might, in a sense, convey the feeling -- [180]

Q What about facts? Let's put aside for the moment feelings.

A I actually had not finished my reply. [181]

Q I am sorry.

A That he might convey the tenor of what the book was to be, which was Gerald Ford's own account of those days. And we wanted the book to be that.

Q You were concerned, is it fair to say, that Mr. Ford would disclose "his experiences" as you used the term

in your letter to Mr. Laster with respect to the pardon?

A Yes.

Q And that Mr. Ford might disclose his reactions to the Watergate crisis?

A Yes.

Q And that Mr. Ford might disclose the circumstances and reasoning surrounding the pardon?

A Right.

* * *

[258]

FRED W. FRIENDLY, called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Professor Friendly, could you tell us what your education is, please.

A I grew up on 110th Street in New York, I attended PS 165, Hope Street High School in Providence, Cheshire Academy. Went to Nichols College, a small college in central Massachusetts, where I studied journalism and business administration.

Q What was your first job after you graduated?

A I went to work for radio station WEAN in Providence, Rhode Island. I was 21.

Q How long were you there?

A I was there until I was drafted in 1942.

Q What did you do at WEAN?

A I was at the beginning an announcer, then a reporter, then a producer, then a news executive.

Q What did you do during the war?

A I was at the beginning a trainee, then because of my communications background I became an instructor in the Signal Corps. When I went overseas I was given [259] the job in the China-Burma-India Theatre of instructing troops on why we fight. I was also a reporter for the CBI Roundup, which was the equivalent of the Stars and Stripes, the armed services newspaper. And I did certain radio broadcasts from places like Hiroshima and eventually in Europe when Morthausen and other prison camps were overrun. I was released from the Army, if that is the proper term, in 1945, just after the end of the war.

Q What was your first job after the war?

A Well, my first job was getting a job. It took two years. I decided not to go back to Providence, where I might have. I came to New York and I got a job first at NBC as a producer doing a program on -- a four-part program for radio on the birth of the nuclear age. And at the same time, I met Edward R. Murrow and he and I collaborated on a series of record albums called "I Can Hear It Now." Which eventually led to me being asked to come to CBS as a producer.

Q What was the subject of those record albums?

A Because of the advent of audiotape and the ability to edit audiotape, it was possible to take all the records that had ever been recorded

of Churchill, literally, Franklin Roosevelt, Duke of Windsor's abdication, and edit them. So Mr. Murrow and I collaborated on a [260] series of four or five albums which were sort of audio history of the period from -- first from 1933 to '45, then from '45 to '52; and then we did one from 1919 to 1933. "I Can Hear It Now", they were called. First in 78 because there was no LP then, then a long-playing record.

Q You said your next position was at CBS?

A The two jobs were concurrent. I produced that series called "The Quick and the Dead" at NBC and then I became a producer and then an executive producer at CBS doing "Hear It Now" and "See It Now." Again, with my senior colleague, Mr. Murrow.

Q What were those programs?

A They were weekly documentaries for ear and then for eye. I hesitate to use the word news magazine. They weren't that. But we did a weekly series, 39 weeks a year on the principal news events of the week and when we were at our best, of the principal news event of the week. I suppose what more people remember than any was a series of programs we did on what I guess we should call McCarthyism.

Q How long did you work on "See It Now"?

A From 19 -- "Hear It Now" from '50 to '51. "See It Now" from '51 till about '57. [261]

Q What was your role?

A I was executive producer and partner of my senior colleague.

Q What does an executive producer do?

A He is the equivalent of the editor-in-chief.

Q What was your next position after you finished in 1957 with "See It Now"?

A There was a fallow period where "See It Now" was off the air and we did a program called "Small World," which I could describe, if you want me to. It was a series of conversations with people all around the world. And then in 1959, "See It Now" by another name, was restored and called "CBS Reports," a title which I contributed. And that I was the first executive producer of "See It Now," of which "CBS Reports" began in '59 is still on the air.

I ceased being producer of it in 1964 because of a different assignment.

Q What was that assignment?

A I was asked to become president of CBS News in 1964, which meant what we call the hard news, nightly news and the documentaries like "CBS Reports." And I stayed in that position until 1966, when I departed, resigned.

[262]Q What were the circumstances of your departure?

A I assume you want a short version?

Q Yes, sir.

A I had taken very seriously our coverage of the Vietnam War. We were able to be the first network to cover the Fullbright Hearings on the causes of the Vietnam War and we went on the air,

frankly, for a half hour and stayed on all day for many days, and whenever the testimony of Secretary of State Dean Rusk, Robert McNamara, George Kennan and others. The other networks joined and at that point there was a clash of positions between top management and me over whether we should be on the air all day or do summaries at night. I thought we had to be on the air all day. Top management disagreed. Another executive was brought in between top management and me, which was not the terms of my agreement to become president of the News Division. And I resigned.

Q What did you do next?

A Well, I started to write a book, which I finished, but simultaneously I had on the same day almost the

next day, visits from the Ford Foundation, from its president, to be an advisor in communications, and from the Dean of the Graduate School of Journalism to become a professor at Columbia. The Edward R. Murrow [263] Professor. I accepted both jobs with the understanding from each of them that that would be satisfactory. I stayed in both those jobs until my retirement a year ago.

Q What was the nature of your position at the Ford Foundation?

A Well, the Ford Foundation, as you know, contributes anything from $100 million to $200 million a year to worthy philanthropic causes. Mr. Bundy, who was the President of the Ford Foundation, thought there was an opportunity

for us to do something in the birth of educational and then public television. It was my job to recommend to the Board decisions that amounted to grants totalling something between $275 and $300 million over the period of the 14 or 15 years I was there. There would be -- I don't mean this to be a self-serving remark, I mean it to be something about the Ford Foundation, there probably would be no such thing as public television without those grants from the Ford Foundation.

Q What did you teach at Columbia Graduate School of Journalism?

A I taught what I knew: journalism, which is all I know. At the beginning, broadcast journalism and the grammar of television and radio. I

found myself [264] more and more interested in the environment of broadcast journalism and began teaching courses on FCC regulations, which some law students took, and on the relationship of the media and the law; which I did not only at the journalism school but at the law school in collaboration with my colleague, Professor Benno Schmidt.

Q How many years have you taught at Columbia Graduate School of Journalism?

A 1966 to now. It may be 15 or 16 years. [265]

Q Have you taught courses which involve questions of journalistic ethics?

A Yes.

Q Which courses involve those matters?

A All the courses that I teach. I am going to teach a course on that tonight not only to journalism but law and medical students and others. I don't believe that the school of journalism should be a trade school. I don't believe we should be there to teach people how to run cameras and edit film, though we do teach some. I believe good teaching involves the placing of students or professionals -- placing them in positions where the agony of decision-making is so great that they can escape only by thinking. So I won't say I so much teach that as I create an atmosphere in which I ask questions and they answer what they would do under certain circumstances, and I do that not only to journalism

students but to law students and even occasionally even judges let me do it to them, and I also do it with young lawyers, medical students. But my principal field of interest is in educating journalists to the jobs they will be doing ten and twenty years after they are out of school.

Q Have you published any books?

A Yes. [266]

Q Could you identify them for us?

A Four major books. One "See It Now," which I did with Mr. Murrow, which was a sort of pictorial history of "See It Now." Then I wrote a book when I left CBS, which was called "Due To Circumstances Beyond Our Control." The first was published by Simon and

Schuster. The next three by Random House. "Due To Circumstances Beyond Our Control." "The Good Guys, the Bad Guys and the First Amendment," which was about the fairness doctrine and regulations having to do with broadcasting. And most recently a book published this year, "Minnesota Rag" which is a historical little picture version of the historic case Near v. Minnesota. I spent a lot of time in Minnesota writing that and explaining what the issues on prior restraint were in 1931 and what they are today.

Q Have you received any honors with respect to your journalistic work?

A Yes.

Q Would you tell us what they are?

A I hope you won't make me recite them all. I happen to think my profession gives itself too many honors. There is the Peabody Award given every year, several awards for broadcast journalism. Some of [267] the programs I produced or caused to be produced or was responsible for won ten awards. I also won the Lasker award several times which had to do with medical reporting. I won an award from NYU for my book "Good Guys, Bad Guys and the First Amendment." The University of Texas awarded me their Journalist of the Year Award, which is called a Merit Award. I think that's enough.

Q Have you won any Emmys?

A I bear the distinction of having taken CBS News out of the Emmy

competition. It didn't last for long. They were back the year after I left. There were programs that I worked on that received Emmys and it makes me uncomfortable to talk about them.

Q In the course of your journalistic work, Professor Friendly, did you come to make a variety of news judgments?

A That's what I did. Every day all day. Sometimes four, sometimes 30.

Q In the course of teaching have you come to explore with your students the nature of news judgments?

A Yes.

Q Are there some such judgments as to which you think reasonable journalists would disagree with each other?

[268]A Yes.

Q Many?

A Many.

Q Are there others as to which you think most or virtually all journalists would agree?

A Yes. Journalism and being an editor is a daily auction of the news hole, which is a term of art that really comes from newspapers more than broadcasting, which is after the advertising is in place, which is the first order of business how much of the news hole do you have left? In most newspapers it's roughly -- in the better newspapers its about 40 percent of the total space, 120, 130 columns. In newspapers I don't respect it gets lower. In broadcasting there is a news hole. So you conduct a daily auction. 7 o'clock at night you

have nothing in the daily news business. That news grows and you then have to make a determination: is it the story on Poland that is important or is it the story of the pardoning of the New York Times by the Governor of New Jersey on his last day in office, which is more important? So what editors do is make news judgments, editors and producers, every day, and you are judged on your ability to do that and serve the public and the [269] public interest, on your judgment.

Q Have you read The Nation article of April 7, 1979, titled "The Ford Memoirs Behind The Nixon Pardon"?

A I have read it several times.

Q Do you recall when you read it first?

A When it first came out.

Q Have you read President Ford's published book "A Time To Heal"?

A I read it when it came out and I read it in preparation for this testimony.

Q Have you read any other materials in preparation for your testimony today?

A I read the deposition of President Ford which was made available to me. I also read what was reputed to be the typed manuscript of his book to see if there was any difference between that and the published version. There often is. And I think I also read a letter from the President, or the executive director of the Reader's Digest on President Ford about this case.

Q Did you come to any judgment, Professor Friendly, as to the newsworthiness of the material published by The Nation in its article of April 7, 1979?

A I thought the article was very newsworthy. It had all the elements of a serious news story about [270] one of the most cataclysmic and serious events in peace time, other than assassinations, in my lifetime as a journalist. Watergate was a sobering experience for all. Everything about it will always be important to the American people.

Q Did you believe that all the material in the article published in The Nation was newsworthy?

A Yes. Some more than others.

Q Have you a judgment based upon

standards used within the journalistic profession as to the propriety of The Nation's conduct -- let me rephrase that. Please strike that. Professor Friendly, I would like you to assume for the moment that you received an unpublished manuscript of presidential memoirs in your capacity as a journalist. Assume further that it was unsolicited by you, unpaid for by you, but that you received it with knowledge that the individual that gave it to you was not authorized to give it to you. Do you have a view with respect to the material that you read from the manuscript of the Ford memoirs vis-a-vis as to the propriety of the conduct of The Nation publishing a news story such as it did?

MR. ZISSU: May I make this objection. [271] Propriety from what point of view?

MR. ABRAMS: From an ethical point of view as that is understood within the journalistic community.

A The first thing I would do would be to verify it.

THE COURT: Professor, what kind of experience have you had in terms of making ethical judgments of this kind, either first or second-hand?

THE WITNESS: If I take that question as I think I understand it, it's been generally in the broadcast area and it was a decision of what to put on television or on radio. Sometimes it was an event that happened in a far away place, sometimes it was an event that

happened right here. Sometimes it was a Government report such as the Warren Commission on the assassination of President Kennedy. But it was a constantly evolving process of determining what we would put on the air. Sometimes there were great pressures from people in high places not to put it on. I don't know if that answer is satisfactory or not.

THE COURT: I am afraid I have to say not really.

A How can I help you?

THE COURT: Well, the hypothetical as far as it goes is fine, but there is a lot more in it, [272] it seems to me, before it's really all encompassing enough to be something for you to chew upon, if I can put it that way, because you have got to assume that The Nation

came into possession of this article, this typescript, knowing that it was about to come out in book form, knowing that it was going to come out perhaps with some editing thereafter, knowing that it was going to be copyrighted and intended to be covered with that protection, and that the author of it was looking to personally profit from the ultimate publication of that article, and that by utilizing this would affect this purloined document of a copyrightable nature or intended to be copyrighted document. All of those factors it seems to me are ones that are appropriate for you to have as part of your fact pattern, and in order for you to -- to put it a little differently, for your views on this to be of maximum benefit

to the Court it would help me to know if you have ever run into situations where you have come into something which has the vast majority of those factors in one or more combinations.

THE WITNESS: I certainly, your Honor, can't give you a precise answer to that.

THE COURT: I would expect that.

[273]A In the course of my job I have read hundreds of manuscripts, I still see hundreds of manuscripts. People want comments, they want blurbs, what have you. I can remember a long time ago reading the galleys of Rachel Carson's historic book, "Silent Spring" to determine whether or not we would do a television program on that, and in making a decision on whether we should

report on some of her findings and whether to do a documentary on it.

THE COURT: Without her permission?

A With her permission. I cannot say to you, except for examples in Vietnam which are not precise to that, I ever found myself in that position. I did several broadcasts having to do with President Eisenhower. I did with my colleagues something having to do with President Truman's book, but always with his permission. If you ask me and I had the time to go back and look at my notes, I could probably find you times when I thought the news value of somebody's book, and the copyright, were two different elements. I will give you a childish little version of that. A primitive version, not childish. Each

of the networks has the rights to the Super Bowl. That means they have the right to televise the game. At the [274] end of the first quarter everybody else would have the right to say what the score was and what was happening. There is a limit to what the copyright can include, and I think the difference is between the news value, the newsworthiness of the event and the precise version that is being prepared by an author or a broadcaster. I cannot say to you that I ever had an instance precisely such as the one that is being adjudicated here, because I think it's almost sui generis.

THE COURT: You were being asked a question which I am sure you and Mr. Abrams probably discussed beforehand

as to the general nature of what he would be asking you, and obtaining from you what you might say in response to what he asked you.

A It was more of the former than the latter.

THE COURT: I wasn't quite sure, without laying some foundation, it was entirely appropriate to say if this manuscript, which we can assume for hypothetical purposes was purloined, had dropped into your lap weighted with all of these conditions, what would you have done. Is that a question you want to field?

A You are the judge.

THE COURT: No, no, you are the witness. I am here to listen. [275]

MR. ABRAMS: Your Honor, I would

like him to field the question, including all the additional elements Judge Owen has suggested to you.

A If I could be allowed this, in my classroon when students ask me a question I always say, "I ask the questions."

MR. ABRAMS: Not today.

A It says on me "professor," and it says on you "student." I think I am better at asking the question than answering. I will tell you what I would be prepared to do if the set of circumstances you hypothesize came to me and I will try to do it quickly. The first thing would be to evaluate it. Journalists are almost paranoid about being fooled and trapped. I think that's healthy. So the first thing I would do

is to make sure that the document I had in front of me was what it purported to be. I might even be so bold as to call the publisher, taking all the risks that I think that might involve. I wouldn't ask them for permission. But having verified -- I might not call if the person who gave it to me was someone I respected and trusted and someone who I knew was in a position to have that.

Having established the fact that this [276] was the document, I would have then read it very carefully, had people who were experts on that period of our history read it, compared it with the known record which I think is the big part of the job of a working journalist, and then I would have reported what I found to be, in that specific

example, some startling revelations. If I had found no startling revelations, if it had been a mood piece, if it had been about President Ford swimming the morning he took the oath of office in his pool so many laps, if it had been about his experiences at Yale, I would have thought that was something that had no great newsworthiness and was not something I should deal with. If I would have found in those documents some startling revelations that the American people had never been exposed to I would have felt it my obligation and my news organization's job to report those to the American people so that they would be in a position, which is a favorite line I have of my mentor Walter Lippman, who always said public opinion was like

a sea, constantly churning up and the journalist's job was to be like a light-house with his search light searching the sea looking for shoals and hidden rocks and silhouetting those, spot-lighting those, for the public to see and to know and to judge, but not do the judging for them. [277]

I would have thought that because of the prominence not only of the author of the book, a man I respect a great deal, but also of then General Alexander Haig, that the American people had a right to know all of those events that led to the pardon, and had to do with the transfer of power so that they could make judgments on those two men, both of whom, as I recall, were in 1979 poten-tial candidates for high office.

THE COURT: Would you have had any question in your mind of calling your copyright lawyer and saying to him, what are my risks in this area?

THE WITNESS: Of course I would. I don't know if I would have had a copy-right lawyer. I would have called my attorney, as I did, I suppose, four or five times a week, and I would say, "This is what we are going to do. Here's the story that we are going to write. What are the up-side risks and what are the down-side risks?" I wouldn't have asked him for permission. I think that was my job, if I were the senior executive. I think it's my job to find out from my attorney what risks, if any, there are, and every attorney that I ever worked with at CBS and other

places would have resisted advising me. He would have said, "Mr. Friendly, [278] it says on your door executive producer or president. It says on mine, counsellor at law. You have to decide what the risks are and what the obligations of printing it are. You have to make that decision."

THE COURT: I know, but he does more than that. Doesn't he recite to you what the copyright law risks are, if this is going to be under copyright you might expect a suit?

A He might tell me --

THE COURT: Et cetera.

A He might tell me that and he might say -- he might say if you were to reproduce chapters 1 and 3, which are the most relevant parts of the book for

this discussion as is, or virtually as is, you will be in jeopardy, and that's why I used the analogy of the football game. If you report what's newsworthy in this writing, just enough quotations to make it bona fide, to make it real, to make it convincing, we have a good chance of winning it. That is what I think he would say. I am not a lawyer and I don't want to pose as being a lawyer. I educated two lawyers. But I am not a lawyer, but I would listen and I would weight that copyright against the civil rights not of the newspaper or the magazine or the broadcaster but of our readers. It's a constant [279] business of weighing, in my profession, as I assume it is in yours. I would have to make that judgment. If today I

were somehow in a job like that again and I had the Stockman memoirs or the Lloyd Cutler memoirs written soon after being in the midst of a great event, and somebody told me what the copyright laws were, I would have to weigh that against the American people's need to know, as I was at the time of the Bay of Pigs, and made a bad mistake and did not report it as others did not, as I did in circumstances whether or not we had nuclear weapons in England. I am more worried about sins of omission than I am of commission. But in answer to your question, I would have to weigh that. I can't permit a lawyer, no matter how skilled, to make those decisions for me. He is not paid to do that. He is paid to make sure I know whatever the risks

are, and I am paid to make sure I know what our obligations to the public are.

[280]THE COURT: In this article, I gather your threshold criteria is the public's need to know?

THE WITNESS: That's right.

THE COURT: In your view, is the entirety of this article within that orbit?

THE WITNESS: I don't think, your Honor, that the entirety of any article ever written, unless it was three sentences long, could be that. Various editors edit differently. Had I edited that, I might have put more in about the Glomar, which was the ship Howard Hughes built to pick up the submarine parts off Hawaii, and I might have used less of something else. But I think that is a

fair job. I don't mean fair as to its quality, and I don't mean fair usage either, from the point of law. I think they did a pretty good job of it. I think the part that I found most relevant and most interesting for the American public to know was the part, and what I think most of that article reflected, on General Haig's conversation with President Ford that some people were talking about the pardon, but we weren't going to talk about that, and the subsequent phone call. I found that startling. I read that, I think, three or four times, and then I read it aloud to Mrs. Friendly, who is a school [281] teacher, because I couldn't quite believe what I was reading, because I think there is a way of saying, "We are

not going to talk about something" in a way that almost has a positive sound to it. And then when I read eventually that President Ford when asked about why it was he didn't say that before, he said nobody ever asked me. The only other thing I might have quarreled with The Nation --

MR. ZISSU: Your Honor, I think he is not referring to the article in that last.

MR. ABRAMS: If I could clarify for the record and for you, your Honor, I think the last reference of Professor Friendly was a line from President Ford in the course of my interrogation.

THE COURT: In his deposition?

MR. ABRAMS: Yes.

THE WITNESS: I'm sorry I didn't

say it better, as to when he said, "No one ever asked me."

I would have gone perhaps back to the testimony in the House to see if that question had been asked, because I also noticed in the Ford book, which I think was very good reading, that he objected to some of the questions being asked to him by a Congressperson. [282]

THE COURT: Let's stay with this article a little longer for the moment. Not that I don't want you to get into other things that I am sure Mr. Abrams will get you into, but if you go through this article, once you have covered what you regard as this so startling disclosure to you, you then get into his being excellent people, you get into whether he should have gone to see President

Nixon when he was apparently very, very ill, and a description of him at that time, apparently a common sense statement by a White House photographer that cut through apparently a lot of possible muddleheaded thinking and put some things in perspective that otherwise were not. Were all of those things newsworthy, in your opinion?

THE WITNESS: In preparing for today, which I looked forward to not only because I thought it was important --

THE COURT: Interesting, but were they newsworthy?

THE WITNESS: Take, for example, the one you mentioned, the boxed quote about "I went into President Nixon's hospital room."

THE COURT: He is stretched out flat on his [283] back, et cetera.

THE WITNESS: I read that, and I liked President Ford for having the compassion to describe it that way. I thought that gave me a better way to measure this fine, good man, and I thought it was important for The Nation to print that. I thought it showed balance, that everything in that article was not just about the pardon. Part of it enabled me to judge the whole man. I think one of the sins of journalism is sometimes we report only the pimples and warts.

THE COURT: But we are not dealing here with judging a man now, we are dealing with whether something is newsworthy enough to justify a breach of the copyright laws.

THE WITNESS: But, your Honor --

THE COURT: And you are saying that that part of this article is justified because it shows you something about balance as to the man. Do you mean that that balancing would justify a district judge in saying the copyright laws therefore are to be sidestepped as to this because it provides a balance? Is that what you are saying to me?

THE WITNESS: I am not saying -- I am not [284] directing you about anything.

THE COURT: As I understand from Mr. Abrams, so we have our foundation solidly between us, his first position is this article is newsworthy, and fair use on what he calls a thin copyright basis. His second point is if it is not

fair use, there are some First Amendment rights that supervene in some manner the copyright laws and prevent the Court from reaching them. We therefore start off with the premise there are copyright laws that have attached, and what I am trying to assess in discussing this with you is what aspects of this are of such a nature that the copyright laws are to be disregarded. You tell me they are to be disregarded as to the Haig conversations because of their startling nature. You then tell me that they are to be disregarded as to his feelings about going to see President Nixon because it shows a balance in the man. Is that what you are saying to me, that copyright laws should be disregarded for that purpose?

MR. ABRAMS: I am not sure if an objection is appropriate --

THE COURT: Sure.

MR. ABRAMS: With all respect --

THE COURT: We are having what I would call [285] a good dialogue here.

THE WITNESS: I sometimes get paid for seminars.

THE COURT: And I trust you are here.

THE WITNESS: I don't know what that means. Certainly, I don't know what you meant by that.

THE COURT: I assume the party that called you at least was going to take care of your expenses.

THE WITNESS: No sir, not true. I bought my own cab fare. There is nobody on earth who could pay me to say anything in a courtroom.

THE COURT: Very good.

MR. ABRAMS: If I could clarify it, part of the purpose of calling Professor Friendly -- and I encourage him to continue with the colloquy -- I did not call Professor Friendly to testify in his view when the copyright law should be overcome because of newsworthiness. I will argue that as I view it to you at some point. I called Professor Friendly for professional judgments as to the newsworthy quality of the material in the article, and not to make what I thought frankly would be a legal judgment.

THE COURT: We went a step beyond that because you asked him if you got this would you publish it.

MR. ABRAMS: Yes, I did. [286]

THE COURT: That then threw into this hopper all the logical things that flow from that, including my question to him, "Wouldn't you call your copyright lawyer," in which case the professor said, "Yes, I would, and he would advise me as to what my risks were," and therefore, I assumed that if the professor as an editor is going to publish this he is going to publish it in spite of risk, because I assumed that a lawyer is going to tell him this is copyrighted and, therefore, if you are going to publish it you have got a risk of copyright problem, and that takes us down to the fact that he is going to say, "I am going to publish it in spite of the copyright problem for some reason."

MR. ABRAMS: Then I haven't done my job well.

THE COURT: At any rate I think it was the original question which took us down this path.

MR. ABRAMS: I encourage the path. I simply want to say first of all I represent to the Court Mr. Navasky will testify he did call his lawyer. I did not ask Professor Friendly that because I didn't want his opinion on that.

THE COURT: We are talking about this in one of the classrooms at Columbia at this point.

MR. ABRAMS: Then I will encourage you to [287] continue.

THE COURT: So you go ahead.

THE WITNESS: By the way, when this is all over, I hope we can do that.

THE COURT: Very good.

THE WITNESS: The reason that I

mentioned that boxed quote about the compassion of President Ford for President Nixon was there is a temptation, when writing stories like this, to only tell about the pimples and warts, and good journalism requires that you balance it with that which is startling in another way and revealing in another way. If I said and did say that I found the revelations about the Haig-Ford conversation startling, I also found in a benign, affectionate way, compassionate way, the story in the hospital, and just to have told one without the other would have been unfair to President Ford. So I have an obligation to report not only the truth but the whole truth, as you would say in a courtroom. That I wouldn't want to just show those things

that might have made that conversation historic in a negative sort of way, and that I want to give a picture of what that book says by President Ford about President Ford, and I would find that relevant and important. [288]

If I were running a risk that this was not quite as newsworthy as the other, I guess in the contest that goes on in my conscience, my obligation to be fair is just as sanctified as my obligation to stay within what you have defined as the copyright laws. I don't know if I have made myself clear or not.

THE COURT: I am not saying there is necessarily an obligation to stay within it, but the task that may be imposed upon me is to determine whether there is a legitimate basis for stepping

without it, and in this you are called upon to give me assistance which I have no doubt you will do in that regard, and I am just probing that with you.

THE WITNESS: I am searching very deeply into my conscience. What I am trying to say is once I decide to go with that story, knowing all the facts, I have an obligation to be fair, and I think that obligation to be fair is almost more important than to be safe. But I wouldn't have expected that my lawyer would have given me a blank wall. I don't think, and I don't want to try to be a lawyer here, I don't think my lawyer would have said that is a terrible thing to do, as lawyers have said to me, if you do that you're going to get sued and we're going to lose. [289]

I don't believe that that is what my lawyer would have told me.

THE COURT: Your lawyer would doubtless have said this is under copyright or is to be placed under copyright and therefore has the protection of the United States copyright laws, would he not?

THE WITNESS: I think I am above my competence. I don't know he would say exactly that. But I think that is beyond my competence.

THE COURT: Let's assume that from my point of view that you called him and you said, "Look, Joe, this type script is in my hand and I have verified it, it's President Ford's, and he doesn't know I have it, and there are some things in here I would like to run."

Let's assume for argument's sake he says to you, "Phew, that's just a mouthful you have just handed me. Fred, there is the copyright laws of the United States of America you are going to have to keep in mind whatever you do." And you are going to say, "What do you mean by that?" And he is going to say to you, "Well, that means that there's certain protection the author has in these" -- he might even say, "I would want to look at [290] it to see if some of it is protected and some isn't." When he has said that to you you are then proceeding on the theory that there is some property right you would be choosing to disregard.

THE WITNESS: If I could respond --

THE COURT: Surely.

THE WITNESS: To a very probing and relevant question, first, I think my lawyer, if he was a good lawyer, and from the rates they charge I think he would be a good lawyer, would say, "My job" -- and this is what our lawyers used to say -- "My job is to help you get stuff on the air. That's my job. Not to be a censor. It's your job to make the decision." The dialogue we just had would have prompted me to say, "You know how," and I am not the editor of The Nation. I think I might have chosen to do another kind of story, which would have been -- a public servant, the highest public servant in the land, two years out of office, during the most historic, cataclysmic moment in peace time history, writing about events

that had been in his service as President, are so much in the public domain and the public has a need to know. I didn't say a right to know.

THE COURT: I said "need". [291]

THE WITNESS: I am always careful not to use that word, I know judges don't like it. So I relish the fact that you said it first. I could be wrong.

I would have then written a piece about that. I think there is a good book on the subject and five years from now you may all get to read it by somebody about what is the right of a chief executive of this country or any other country to be present at the creation, to be there when these great events are made, who is paid for the rest of his

life to be a former president, to be guarded, protected, libraries, offices, everything else -- what is his right suddenly to take information which the American people should have known -- I am speaking generically now -- and sell that back another way.

I know that's not what this case is about, but I think that's what my story would have been about. Mr. Navasky of The Nation chose to write a different way, but I think I might have done a story about that. Because whether it's Henry Kissinger or whether it's Harry Truman or whether it was Dwight Eisenhower or whether it's the President five years from now, I think the business of these exorbitant fees paid by broadcasters and publishers for people

writing about things that they should have told when they were in high office and when they testified [292] is something that I think is as serious at least as what brings us into this room together.

THE COURT: That is not quite responsive to what the lawyer would have said to you and what your response would have been.

THE WITNESS: I think the lawyer would have said, "If you think you can write this story so as not to invade the copyright" -- he would have given me the copyright laws to read and I would have read them as best I could, and I would have written this story without a lot of block quotes and without plagiarizing, I am not a plagiarist and I don't believe

The Nation is. I am not going to print the chapters as the Reader's Digest or a book digest would, but I would report using the analogy of the Super Bowl so the reader would know what happened. I could have satisfied my lawyer and my own sense of duty and law.

THE COURT: Now, you used the expression just a minute ago the lawyer would have said, if you can do this without invading the copyright law?

THE WITNESS: Right.

THE COURT: So that would be then a recognition on your part that you have got to have some journalistic justification for the invasion.

THE WITNESS: I don't think he would have told [293] me to invade it. I think he would have told me there is a

way to write a story like this, there is every day. Newspapers, I assume, I believe, I remember that newspapers and magazines wrote about The Nation article. There are ways to write a story using a minimum of exact block quotes, as I call them, to satisfy those copyright laws, but copyright laws of this country --

THE COURT: This is to satisfy the fair use doctrine.

THE WITNESS: That's right. But I don't want to put myself in the position of deciding fair usage. That is a job for the Court. I think it's possible for me to take any story out of any publication or broadcast and take that story and with skills I have, or people who work for me, who are often more

skilled than I am, to write that story in a way that wouldn't invade the letter of that law, or the spirit of it.

THE COURT: And one of the ways is to take a portion that is clearly newsworthy?

THE WITNESS: Right.

THE COURT: And the other is to write it in such a fashion that you are not doing a wholesale taking?

THE WITNESS: That's right.

THE COURT: All right. [294]

THE WITNESS: And I think -- it isn't black and white, there is a grey. One would have been to have taken chapters 1 and 3 and condensed them. One would have been to have written a line "President Ford says he did have a conversation about the pardon, but he said

later that had no relevance." I think that would have been irresponsible. I think in between those two extremes is what an editor does, a producer does, and I believe that is what The Nation did.

THE COURT: And the Nixon in the hospital is an appropriate tag-on because it's balance?

THE WITNESS: It helps to make balance. That is exactly right. It helps me to understand -- I mean, you could write that story in such a way that it would be unfair to President Ford. I think that's quite a fair piece. But that's my reason for pointing that out as something that I think has a place in the story.

THE COURT: The bottom line would

be that if this had come to your hands under the circumstances described you would have published, given your observations of the circumstances?

THE WITNESS: Not in a finite way because I don't want to say I would have done it just that way. [295] I am a broadcaster.

THE COURT: What would you have done differently than The Nation?

THE WITNESS: First, there is the limitation of the broadcast schedule. That piece which was a couple of thousand words, I guess, you would have to do a documentary to do on television. If I have done a documentary on it, it would have been about public officials and their memoirs. I think that probably would have been a four or five

minute piece, and I would have been limited in that. But I would have had much of what they had in there. I might have put the Glomar in and taken something about Kissinger out, but as a chief justice once said, editing is for editors.

I am not saying that as a point of law. I am just saying that there is no editor who wouldn't edit something differently. If I were to read something of James Reston in the paper today, and wanted to report what James Reston said about your Honor or President Carter, I think I could do that in a way that wouldn't have invaded the copyright law and still make sure that you, if you hadn't read the New York Times that day, if you were a reader of the Washington Post, would have known what Reston said.

[296]THE COURT: I want you to put this without unfairly being suggestive to you, but do I gather that if you had been in the publisher's shoes with this article you would not have gone quite as far as this article went?

THE WITNESS: I don't want to say that. All I'm trying to say to you, Judge Owen, is that I might have put some things in that they didn't put in, as in fact the editor of The Nation might have put some things in that I would not have put in.

THE COURT: Then the structuring of this text is consistent, in your view, with what you would have done, given the selection that was made, is that what you are saying to me?

THE WITNESS: That is what I am saying to you, sir.

THE COURT: All right.

THE WITNESS: I think the one exception -- and perhaps I will impress somebody with my credibility -- is that I wouldn't have put that block thing in there because I think somebody would have asked me that. I'm not a great believer in putting block quotes like that in articles like that. And I don't want you to think that I am in here to give The Nation an A plus on that article. I'm here to say they did a good job. [297]

THE COURT: Would this be a good time to take our midafternoon recess? We'll take a ten minute recess.

THE WITNESS: Does that mean I can go?

THE COURT: I doubt it.

(Laughter.)

(Recess.)

BY MR. ABRAMS:

Q Mr. Friendly, in the course of your colloquy with Judge Owen, you were asked certain questions about aspects of the article and certain judgments that you have reached about the article. I want to make sure that there is an additional factor included in your consideration and your testimony. Assuming that you decided, as you have testified that you have, that it was appropriate to publish an article such as this, even though you said it is not an A plus article in terms of grading --

A I grade very high.

Q Would it make a difference to you in your decision about whether to

publish if you had known that a news magazine was in the order of two weeks later scheduled to publish excerpts from the memoirs?

A I would have no way of knowing what they were [298] going to publish, and I am only in charge of one news organization. Not knowing that, I would say it is my job to get the information out as best I can, as reliably as I can, with whatever insight and organized curiosity I may have. I could not let that be a factor.

Q Would you try to get it out as fast as you could consistent with your publishing or broadcasting schedule?

A Depends what you mean by fast. I would not be reckless. My criterion would be: Is it a fair reflection of

the book, is it accurate and have I done as much digging with the known record, et cetera. You would not try to get it out in 24 hours, I would not try to beat the competition. Somebody told me that -- I would always assume that if I had it, maybe some other people had it. That wouldn't really enter into my mind, especially if I was publishing a magazine like The Nation. That would not be a factor. I train myself to get it right, to get it straight, and then publish it.

Q You testified that one thing that you would [299] do if presented with the memoirs would be to talk to experts and compare the article with the known record. Have you a view as to whether it is also appropriate

journalistic effort to write a news story with respect to the article itself without engaging in those actions which you testified to?

A Yes, that's one way to do it. That's really what this is.

Q Is it your view that it is one appropriate way to do it from a journalistic point of view?

A It is very appropriate. I wouldn't want to be misunderstood. The story that can't be edited hasn't been written. If suddenly the editor of this piece had to get out 300 words, he would get out 300 words. That's all I was trying to say, that various people editing a piece will put some things in and not others. I think it is just an incredible job. I found it eminently

readable, as I told you before. I read it twice.

Q In your colloquy with Judge Owen you spoke about the passage in which President Ford described President Nixon stretched out flat on his back in the hospital bed. I would like to direct your attention now to some of the other elements in the article which I had put before you [300] during the recess and ask you to give us your views as to the newsworthiness of those aspects. I will not take it in order, but in what I think is the order that you may have referred to it in your colloquy with Judge Owen. One of the sections at the bottom right at page 34 is with respect to David Kennerly, the White House photographer. Do you have a

view as to whether the information contained there is newsworthy?

A I think it is newsworthy. I think a 30-year-old photographer commenting on the Mayaguez at the highest council of the White House tells me something about the way business is being conducted in the oval office. Therefore, newsworthy.

Q Returning now to the passage on Secretary Kissinger in the preceding column, have you a view as to whether the material that is contained there, beginning towards the bottom of the column, on the left column and continuing on the right column there, is newsworthy material?

A Yes.

Q Why is that?

A Kissinger had been head of the national security office, had become Secretary of State, was obviously extremely powerful in the new administration, perhaps more than [301] in the Nixon administration, because President Nixon considered himself a foreign policy expert and will be remembered for the recognition of the People's Republic, and the relationship of Kissinger to that, and Kissinger saying to him, "It's my job to get along with you, not yours with me," is relevant.

Q What about the paragraph on John Connally, in the next column.

A At that point Connally too is in the sweepstakes for the Republican nomination in 1980, therefore, newsworthy.

Q That point, you mean when?

A When I read this.

THE COURT: '79.

THE WITNESS: '79. When I as an editor was preparing it, when my public was reading it or listening to it, it was when John Connally was a leading contender. As a matter of fact, before the primary he was perhaps the leading contender. The more I know about him from a source like this, the better. This is the President of the United States talking about him.

Q What about the section entitled "On the decision to run again"?

A Newsworthy because, as President Ford says, I believe, in another part of the book, and in the interrogatory [302] with you, if that is the right word, --

Q The deposition.

A The deposition, sorry, he was constantly being asked, are you going to run again? He couldn't go to a news conference, as I remember it, without being asked that question. There was, until the night that President-elect Reagan was nominated, a question as to whether President Ford might not be the vice presidential candidate, and I can remember that night, when many of us went to bed believing that he was going to be the vice presidential candidate under President Ford, and that was changed because they couldn't work out the details. So I call that relevant, I call that newsworthy. That event had not happened then, but the fact is that whether or not President Ford was going

-- former President Ford was going to be a candidate in 1980 presumably to run against a man who had just barely beaten him, was newsworthy.

Q What about the section on President Nixon's character, towards the bottom of the right column on page 364?

A I never can figure out the pagination in The Nation, so I am looking to see --

Q I'm sorry, it is the right column of the page that you are on right now. Entitled "On Nixon's Character."

[303]A It tells me almost more about President Ford than it does about President Nixon, but newsworthy. I am a little uncomfortable with this whole exchange because I'm saying that everything is newsworthy. If you ask me to

grade it, obviously some stuff is more newsworthy than others. And I don't want to be simplistic in my answer. This is hard ball I am playing with the Judge, and I don't want to sit here exclaiming newsworthy, newsworthy, newsworthy, and have him say to me, well, the way you put it, everything is a four star newsworthy. Some are only three and a half. Sorry about that.

(Laughter.)

Q Could you direct your attention to the first page of the article, right under the caption "The Ford Memoirs: Behind the Nixon Pardon," and in the second paragraph where -- let's do it line by line. The first line says, "Ford also writes that but for a misunderstanding he might have selected

Ronald Reagan as his 1976 running mate." Was that in your view newsworthy in 1979?

A I call that a four star, yes.

Q Why is that?

A Because the country had gone through a trauma and who the candidates were going to be in 1980 was very [304] important and who the candidates were in 1976 was also important. And it was relevant to, I suppose, whether the pardon would have taken place just as it had, had there been another man as vice president. We are going to be talking about that for the next hundred years. Our grandchildren will be talking about that. It is relevant news. It is relevant history. But it's very relevant at that time.

I think it deserves to be way up top in this. I might have written a little more of the dialogue between General Haig and President Ford than is in this article, but I certainly -- the fact that he seriously considered Ronald Reagan is relevant, important, newsworthy.

Q Have you a view as to whether the fact that President Ford wrote that Edward Bennett Williams was his choice of head of CIA as newsworthy?

A Well, I am going back now to my Judge Owen problem. I don't want to sit here and say four star, four star, four star. I will lose whatever credibility I have. I don't find that as interesting as some of the other stuff, but I find it has news value.

Everything has news value. That has a lot of news value. But, you know -- [305]

Q I will ask you just one more, to avoid --

A I am critical of everything I read. I could write you a very tough critique on this piece. That doesn't mean that I don't think it's newsworthy. I'm saying that I as an editor and a teacher of journalism, I am very critical of everything I read. You asked me if the part about Edward Bennett Williams, whom I know, is as newsworthy as the part about the pardon. It is newsworthy, but it is not as newsworthy as the other is.

Q Have you a judgment about whether the statement that President Ford's memoirs say that it was President

Nixon who first proposed Nelson Rockefeller for vice president and that Ford regretted his "cowardice" in allowing Governor Rockefeller to remove himself from contention is newsworthy?

A I found that stunning. If anybody other than President Ford said it, I'm not sure I would believe it, knowing the Rockefeller-Nixon relationship for the last 25 years. If it is there and it is said by President Ford in that book where he had no reason to say it if it wasn't so, I'd believe it and find it eminently newsworthy.

MR. ABRAMS: Thank you, Mr. Friendly.

I have no further questions.

THE COURT: Do you want to cross examine [306] now? We discussed this last week, you know.

MR. ZISSU: Yes, your Honor. I think that the plaintiffs would like to take some time to, you know, to cross examine and to consider a rebuttal witness with respect to Mr. Friendly. That may also be true of the others. And I suspect it will be true. So we would then go on to the next direct witness.

THE COURT: Professor, we will excuse you at this point.

* * *

[327]

RICHARD REEVES, called as a witness by the defendants, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Mr. Reeves, what is your occupation?

A I am a writer, a journalist.

Q What was your education?

A I was educated as a mechanical engineer. I am a graduate of Stevens Institute of Technology.

Q What was your first position after graduation?

A Engineer for Ingersol Rand Corporation in Phillipsburg, New Jersey.

Q What was your next position?

[328]A I was the editor and general manager of a weekly newspaper in that town, the Phillipsburg Free Press. I founded the paper with another person.

Q What year was that, sir?

A 1961.

Q What was your next position?

A I was a correspondent for the Newark Evening News in Newark, New Jersey.

Q What did you cover for the Newark Evening News?

A I was originally the night assignment reporter in Northern New Jersey and then the Passaic County Bureau Chief and covered Passaic and part of Morris County of New Jersey, or was responsible for that coverage.

Q What was your next position?

A I became a reporter for the New York Herald Tribune.

Q What year was that?

A In 1965.

Q How long were you with the Tribune?

A A year.

Q What did you report about?

A By then -- I began as the New Jersey political correspondent and then

I became the New York political [329] correspondent, and for a time before the Trib folded I was in charge of an investigative unit at the Trib.

Q What is an investigative unit?

A Essentially people who went out and tried to develop their own stories or followed through on stories that were already in the news, and we did things on city health services, on air pollution, and did long series which the Trib did in those days.

Q What was your next position after leaving the Tribune?

A I was correspondent for the New York Times.

Q How long were you with the New York Times?

A A little over five years.

Q What did you do at the Times?

A I was initially a general assignment reporter, and then City Hall Bureau Chief, and then chief political correspondent.

Q When did you become chief political correspondent?

A In 1968.

Q Until when were you chief political correspondent?

A 1971.

Q What did you cover as chief political correspondent?

A I was in -- at that time the Times had a somewhat [330] different situation, but I was in charge of political coverage in the metropolitan area, which is New York, New Jersey, and Connecticut, and did national politics for

the Sunday edition, and the metropolitan job involved a staff of people.

Q What did you do after you left the Times in 1971?

A I became an editor at New York Magazine, and a columnist for Harper's Magazine.

Q What was the scope of the work that you did at New York Magazine?

A National affairs, politics and government, and also some local at New York Magazine. At Harper's it was all national.

Q What did you do at Harper's? What was your position?

A I had a monthly column. A monthly column on national politics.

Q How long did you work at the New York Magazine and Harper's?

A I was a couple of years at Harper's, and I was five -- about five years at New York Magazine.

Q What did you do next?

A I essentially began to work for myself. I [331] had also done some television at the same time and wrote books, and for a while I just did that work on books, did some television, and then I went to -- about a year after I left New York Magazine, I became national editor of Esquire. I was first a columnist on media for Esquire, and then became national editor, which was close to being a full time job. I was doing some consulting work for NBC, and that kind of thing.

Q What time frame are you talking about? When did you become national editor of Esquire?

A 19 -- the end of 1977, I think. From about the end of 1977 to toward the end of 1979. I don't remember the exact dates.

Q And when did you begin writing a media column?

A That was earlier. That was toward the end of 1976 -- the beginning, I can remember that, it was in February of 1977.

Q And how long did that continue?

A More than two years. Three years, maybe.

Q What did you do next?

A I went -- well, in the period I was with Esquire I began a syndicated column which appears twice a week in newspapers around the country, and then

began to write [332] for the New Yorker, and worked on books.

Q And do you have a syndicated column today?

A Yes.

Q Is it published anywhere in the New York area?

A It used to be in the Daily -- it was in the evening edition of the Daily News Tonight. I guess it's not in a city newspaper. It's in Westchester and through New Jersey.

Q How many newspapers are you syndicated in?

A 150.

Q Have you been associated with National Educational Television Network?

A Yes. I was -- originally I was a political commentator for them

since 1968, and have done a lot of work for them over the years including a documentary on courtrooms which ran on the PBS network, and actually I am currently writing a series for them on a book I am doing.

Q You mentioned you had written some books. Can you tell us what books you have written and what they are about?

A My first book was called "A Ford Not a Lincoln," about the presidency of Gerald Ford. The second one [333] was called "Old Faces of '79," which was a series of profiles of the political figures of our times. The next was called "Convention," a book on the Democratic convention in 1976. Then a book called "Jet Lag," which was a

book of essays basically about California and New York. And another one which will come out this year.

Q What is the book about that will be out this year?

A It's a retracing of the American travels of Alexis de Tocqueville, a modern "Democracy in America," or an attempt at that.

Q Have you done any teaching?

A I taught political science at Hunter and journalism at Columbia University Graduate School of Journalism.

Q Have you received any honors?

A Awards, yes. Awards are not hard to come by in journalism. The pay isn't good, but the awards are great.

Q Can you tell us some of the awards you received?

A I won the Emmy for best documentary film, the American Bar Association, I think it's Golden Gavel for court reporting, American Political Science Association, a Distinguished Reporting Award, Front Page [334] Award, and I got various and sundry awards.

Q In your capacity as a journalist, have you made a variety of news judgments?

A Yes. As an individual on my own stories and also while I was editor of a paper and was assistant state editor of the Newark News for a while and national editor of Esquire for part of that period and assigned and studied what would run, and that kind of thing.

Q Have you commented on news judgments in your media criticism?

A Yes. Both in Esquire, in the books, and a lot of my column actually is about media as opposed to politics.

Q Do journalists generally agree on a definition of what is newsworthy?

A Journalists argue a heck of a lot about what is newsworthy, but there is obviously a professional consensus as to what is news which you only have to look at the three nightly news programs to see how those decisions are made independently or the major newspapers in the country as to what they decide to play on page 1 or Time's cover or Newsweek's cover. Those are groups of professionals independently coming to the same conclusion, so that there are arguments but there is also a kind of professional [335] consensus.

Q Have you read The Nation article of April 7, 1979, entitled --

THE COURT: Can I trouble you for that consensus? What is the consensus? Structure it for me, if you will.

THE WITNESS: This is one person's view, obviously, but I think each day --

THE COURT: No, I thought there was a consensus.

THE WITNESS: No. I guess it's a post facto consensus. Each day organizations around the country, without consultation with each other, are making decisions about what will go on the news programs that day or the front pages of their newspapers or the covers of their magazines, and there is a high incidence of the same stories, a high incidence of correlation between those decisions.

That's what I meant by people coming to the same conclusion independently. But they don't confer.

THE COURT: The second fact that would establish is that there is a general approach to what is newsworthy that you all share?

THE WITNESS: Yes.

THE COURT: What is that approach?

[336]A I wish I knew. I think that the approach is probably made up of a set of informal rules that are compiled over the years. It's more a system that derives from practice than from any written guidelines. Whatever the President of the United States says is news. Any disaster that takes human life is news. Any public officials stealing money is news. Crime is news. I'm not

sure that anyplace those things are written.

THE COURT: I understand.

THE WITNESS: But that is what the profession is, I suppose.

THE COURT: Because, you see, Mr. Reeves, one of the purposes of your tender as a witness by Mr. Abrams, as I understood, was to assist the Court in a determination of what the industry felt was newsworthy, and, therefore, I come to you with the expectation that you are going to be able to enlighten me on what the industry calls newsworthy, and, therefore, I am approaching this maybe wrongly, but with the view that you possess, perhaps ill defined at the extremes, some definition of what you and the industry regard as newsworthy.

Obviously, when you get down to the edges of certain stories some people would disagree as to whether [337] something is newsworthy or is not newsworthy.

THE WITNESS: Right.

THE COURT: But that is what I thought you were going to tell me.

THE WITNESS: I will. I will go into much more detail about that if you would like me to.

THE COURT: I would.

THE WITNESS: I'm not sure how to approach the question. I mean, I feel personally qualified that I could walk into any news operation in the country. There are thousands of people who can do this. And I would, as we would say in the business, I would know a story if I

saw it. I know, I think by virtue of experience. I have an idea of what would get in a newspaper, what wouldn't, what would get in a magazine and what wouldn't, but I'm not sure how to respond to that in explaining.

THE COURT: What are the criteria you apply?

THE WITNESS: I think the criteria, broadly defined, would be what the public needs to know and what the public wants to know. And I think that those are two separate categories. And that the balance between them kind of determines the professional reputation of a journal or an electronic news program. The New York Times gives people more of what they [338] need to know. The New York Post may give them more of what

they want to know. But I think that's the broad, a broad working definition that many journalists would agree on.

Now, should I go into talking about what someone like me would think the public needs to know -- particularly what they need to know? [339]

THE COURT: Well, I gather you are going to do that at some point, focusing on The Nation article, which is the subject of this --

THE WITNESS: I think so, from conversation I have had.

THE COURT: Why don't you do that and if I have questions flowing from that, I will feel free to cut back in.

THE WITNESS: All right. I felt I was a little inarticulate.

Q You have read The Nation

article of April 7, entitled "The Ford Memoirs: Behind The Nixon Pardon"?

A Yes.

Q When did you first read it?

A My memory is that I read it -- I know I was traveling, because I was traveling on the book I talked about at that time. My memory is I read it when I got home from a trip, so I probably read it a week or so late. But I was aware of it because it was in the newspapers at the time that this article had come out and the information in it, and what not. And obviously Ford was a person I was more than casually interested in.

Q Have you re-read the article in preparation [340] for your testimony today?

A Yes.

Q Have you read any other materials in preparation for appearing here today?

A Not as much as you wanted me to. I looked a little bit at the complaint and glanced at part of the Ford book and the deposition.

Q The deposition of President Ford?

A Yes.

Q Did you look at any portions of the typed manuscript of "A Time To Heal"?

A Yes, but I really only glanced at it. I read a good deal of it at the time it came out and I glanced at the manuscript. I did not do all my homework.

Q That's nice to know. Directing your attention now to the article in The Nation on April 7, 1979, have you a judgment as to whether the material published there is newsworthy?

MR. ZISSU: I have an objection on this ground, your Honor: I thought the witness was going to testify on having read either President Ford's book or the manuscript and would testify as to what might or might not be newsworthy in that manuscript which was the manuscript that came into possession of The Nation. [341] It seems to me that it's the wrong approach to look at The Nation article.

MR. ABRAMS: It seems to me one appropriate approach, your Honor, for me to inquire of this witness as to the

article in question here, which brings about this lawsuit. I'm not suggesting and have not by calling Mr. Reeves, that that is necessarily the end of the case. But it seems to me that one of the relevant factors here under fair use is the purpose of the use, the nature of the use, and it seems to me that I should be entitled to make a record as to the use itself. The use itself is The Nation article, not the manuscript. Whatever is in the manuscript, it is relevant to show and therefore to be able to argue to you at the close of the case, that the material in The Nation article, which is the accused document, as it were, is newsworthy and to deal with the reasons why it is newsworthy. Then we will have legal arguments later on as to

the interrelationship of that to the manuscript. But that at least is part of a relevant issue.

THE COURT: The interrogatory, as I understand it, which you furnished plaintiffs, says that they are expected to testify that the treatment given newsworthy material in the manuscript was appropriate in the light [342] of long-established journalistic practice. It does seem to me, therefore, that you have to start off with what in the typescript manuscript was regarded as sufficiently newsworthy in this gentleman's opinion to have found its way into this article. I would sustain that objection. I think you have got to start with the typescript.

Q Mr. Reeves, in your review of

the manuscript and of the book, "A Time To Heal," directing your attention particularly to Chapters 1 and 3 of it, did you reach any conclusions as to the newsworthy character of any information contained therein?

A Yes.

Q Can you tell us, first, in general, what type of information you believed to be newsworthy?

A Obviously whatever Ford had to say about his actions when he was President of the United States, and Ford's judgment and interaction with people who were still public figures and still affected his very real and at that time current ambitions to be once again president.

MR. ZISSU: I am going to have an

objection. I don't think the foundation has been laid that the witness read the manuscript or even read the book, other than he stated he glanced through it. I'd object on that [343] ground.

THE COURT: Clear that up for us, will you please?

Q Have you read the book, "A Time To Heal"?

A Yes. I have not read every word of that book, though. I mean, I read the book at the time it came out. I wrote about the book at the time it came out.

THE COURT: In what form did you write about the book?

THE WITNESS: In terms of inconsistencies of -- I had written a book about Gerald Ford, so that some of

the versions in his book about events that had happened were different to a degree from things that he had said at the time they were happening. I mean, those had both historical and news value at that time, at the time the book came out. The book itself coming out was a news event.

Q Why is that, sir?

A Well, this was his -- we are talking about a man who was, you know, part of the American dialogue, an important part. And everything he said, he has said after his presidency, as he said during his presidency, is news. Gerald Ford is one of that group, a part of [344] any definition of news would be that there are a group of people in this country of several hundred who almost

everything they do is news, and of that group there are probably a couple of dozen people who are potential presidents of the United States. And everything they say and do is certainly considered news by the news business.

Whatever Edward Kennedy does is news, because Edward Kennedy could be President of the United States. Whatever Nelson Rockefeller did was news for that reason. Whatever Gerald Ford did and does is news. Gerald Ford, after all, tried to run for president after this book was written. And there were many people who knew he already was considering that at the time the book was written. And he was already meeting with people about running for president again. So that his view of certain

things, his view in the book of Ronald Reagan, of Alexander Haig, of Henry Kissinger -- and Haig also then was a candidate for president, informally. These were important political events at the time the book came out. Significant political events that fall, I would say, fall well within the definition of news. I mean, they are very close to the center of news in this country, because that is the information [345] people need about the people who would lead the democracy.

Q Is there some information which is more central, in your view, to what you have characterized as the public's need to know than other information, even though they are both about public officials?

A I didn't understand that.

Q You used the word in your last answer, that what Gerald Ford thought of Alexander Haig, for example, was close to the center of the definition of what's news because it related to what the public really needed to know.

A Well, what the public, particularly the public identified with the Republican Party, needed to know at the time we are talking about -- at the time that book came out, Alexander Haig was ending his stint as Commander of NATO. He was giving interviews, sometimes with his name, sometimes on background, to the most prominent columnists in the country, talking about his own presidential ambitions and the fact that he planned to resign to come back to the

United States to begin a campaign, James Reston of The New York Times, being the most prominent of the people getting those interviews. At the same time, number of Republicans were calling on Gerald Ford during that period, which I again wrote [346] about, saying that he should run again in 1980. He was encouraging them. He was privately offering the opinion at that time that Ronald Reagan was unqualified to be President of the United States. These people had come to him saying we must stop Reagan from being president, this man can't do it.

Ford later said these things publicly. So that when -- Gerald Ford writes a book saying that when he was President of the United States, he

considered making Ronald Reagan Vice President, that is a major political statement. He is planning to -- he is planning a presidential campaign against the man, says he is unqualified, yet two years before he considered making him vice president. That is what I mean about what Gerald Ford does is news. And if Gerald Ford did it today -- if Gerald Ford breathed today one criticism of Ronald Reagan's speech last night, that would lead most of the newspapers in this country. That would certainly be well within the consensus.

Q In your view, is what you have just said about the centrality to the very notion of the public's need to know of information with respect to President Ford, General Haig, et cetera, part of the consensus [347] as well?

A Yes. It was -- my memory, and my memory may not be perfect, that when the information, some of the information that came out in the book about Haig and Ford's negotiations and the pardon and what not, some of which was new, some of which wasn't, came out, that that was on the front page of the newspaper that I read. I was traveling through the south at the time. It was considered news by the editors of the papers where I was in that time.

MR. ZISSU: Could I just ask what date?

THE WITNESS: April of '79. My memory, and I may be wrong on this, is that I was traveling through New Orleans and Alabama on the book I was doing.

Q I want to direct your

attention now, Mr. Reeves, to the article --

THE COURT: Do I understand your view is that absolutely nothing that Gerald Ford has ever done is therefore other than news?

THE WITNESS: Adding the word "potentially," I would say yes. I mean, there are clearly things that are of no interest to anyone and there are other matters where taste and decency are probably involved. But potentially everything that Gerald Ford has done, does, and will [348] do with his life is news in the United States, or would be considered news by the professional community of people who put together news organs.

THE COURT: Is he therefore not

entitled to copyright protection as to anything that he's ever done? Is that what you are saying?

THE WITNESS: I don't know whether that's the case or not. I don't know much about copyright law. But I know that I never heard the word copyright discussed in a newsroom. I mean, we, the people who sit and put together papers, don't spend time talking about things like that.

THE COURT: We are going to have to --

THE WITNESS: Oh, no, you do, but --

THE COURT: I have to, because obviously this is a collision of copyright matters with other matters.

THE WITNESS: Right. I would only,

I don't know if I am speaking out of turn, if I were still at The New York Times or anyplace else and a manuscript, letters from a president, whatever, from a President of the United States about his public actions came in about the Mayaguez, about whatever, came in, the thought of copyright or whatever commercial use was being made of the property would not enter into my decision. [349]

THE COURT: Let's stick with -- forget the letters. Let's take a manuscript. Let's suppose you come into possession of a manuscript of a book of his that is about to be published. I'm sure, being an author yourself, your books are copyrighted and therefore you would be aware that this was doubtless either copyrighted or to be copyrighted.

THE WITNESS: Right.

THE COURT: In anticipation of publication. Are you saying that if you found something newsworthy in that book you would publish, irrespective of the copyright?

THE WITNESS: I would publish first, and think about it later. I mean, the difference between -- there is a great difference between Gerald Ford and me. I mean, I --

THE COURT: I am only talking about you to the extent that you uniquely are aware, and an awful lot of reporters may not be, of the fact that a book of this kind is a copyrighted instrument and therefore it would be in the back of your mind, Ford is copyrighting this for Harper and Row.

THE WITNESS: I don't think it would be in the back of my mind. I know that obviously I had conversations with -- I mean, I am aware that copyright [350] is at issue here. But I think in conversations with Mr. Abrams, I pointed out the fact that I had never heard that word mentioned at a newspaper or magazine in consideration of whether something should be published or not. And I don't ever remember it being in the back of my mind.

THE COURT: I am talking about if you were responsible for publishing or not publishing the contents of the manuscript of a book that came in, you have come into possession somehow of the manuscript of a book, you are aware that that probably is a copyrighted document

or to be copyrighted prior to publication and therefore there are copyright features about it that do exist. You certainly have that awareness.

THE WITNESS: I'm sure that is true, and I have that awareness at this moment. I have never taken that into account in any judgment that I have made. [351]

THE COURT: But you may never have been faced with that.

THE WITNESS: It's possible I never was. I just literally never thought of it.

THE COURT: If you were faced with it -- you see, I'm not going to charge you with what others may have done, but Professor Friendly, whom I am sure you know --

THE WITNESS: Right.

THE COURT: Probably socially as well, yesterday acknowledged to me that he would be on the phone to his lawyer saying, "What are my copyright problems," before he would publish. May I ask whether you would have a similar concern?

THE WITNESS: With -- I would not -- it's a hypothetical situation.

THE COURT: Yes. Well, it isn't --

THE WITNESS: If it concerned a President of the United States --

THE COURT: It is to you, it may not be to somebody else.

THE WITNESS: Right. If it concerned a President, a potential president, I would not -- I wouldn't need a lawyer to know what I was going to do.

I would consider it my professional obligation to transmit that [352] information.

THE COURT: To focus on one aspect that Professor Friendly and I discussed at some length yesterday, there is a description of President Nixon in a hospital setting, where President Ford goes to visit him. Do you feel that that description is news?

THE WITNESS: I thought it was big news. I was with Gerald Ford that day. And Gerald Ford, among other things, has always talked -- this is almost personal -- has always talked about his great credibility, and truth is the glue that holds us together to quote his wife's stitching, which becomes news. The version in the manuscript is different in a

number of particulars from what happened that day. So that I think that it was very revealing about one of the most important figures in our country; that that particular part of the manuscript was in fact news for that reason. It was certainly news when he gave a different version of things at the time. So, therefore, correcting the record as soon as possible was certainly news.

Q Can I just interject. Can you expand a bit in response to Judge Owen's questions, how was it different from the record at the time? [353]

A The difference in the manuscript is where Ford goes through his own thinking in whether or not he was going to see Nixon, which at that time was a very big issue is quite different.

He was denying in public up to a couple of hours before that he had any intention of seeing the President. And his spokesmen were denying at that time that he had any intention of seeing President Nixon or that that had anything to do with the fact that he had traveled to the West Coast.

Then, after he came out, and then of course it's clear from the manuscript that he intended to all along, and journalists that said they believed he intended to were -- the press office of the White House attacked those journalists for speculation, the usual things that are said. And then when he came out from seeing President Nixon, he gave -- I was actually stunned by the words in the manuscript about "I had

never seen anyone so close to death" kind of thing; because he said much different things when he actually came out of that room. He gave the impression that Nixon was in pain, in discomfort, great discomfort, but that he was fine and well. I mean, questions of Mr. Nixon being near death and what not, were not part of that particular day.

THE COURT: All right. [354]

Q Mr. Reeves, I want to follow up on one of Judge Owen's questions to you about what you would have done and what ordinary journalistic practice would be if you had gotten a chapter from the manuscript --

THE COURT: Can I go back for just a minute on this?

MR. ABRAMS: Of course.

THE COURT: It therefore is news if, as you contend, it demonstrates different versions of a different -- of the same incident which either cast light upon general credibility or the public face that one wants to present at a particular time, correct?

THE WITNESS: Yes.

THE COURT: All right. This does not do that. This does not purport to draw a comparison with an earlier public statement and therefore present what you regard as the newsworthiness of it.

THE WITNESS: I don't understand that.

THE COURT: And therefore why is it therefore news if you have left out the thing that you say makes it newsworthy, which is the drawing of the comparison?

THE WITNESS: I'm not sure that we are talking about the same thing. If I run in my newspaper a story saying Gerald Ford decided at the last minute to see [355] President Nixon and I later find out that that was not the case, I owe it to my readers to tell them what the case actually was, in his own words.

Q I think, if I may, Mr. Reeves, what Judge Owen is asking you, if I may, Judge Owen, I'd like to put the article in front of you and ask you a question about the passage of the article itself. The article is listed as Plaintiffs' Exhibit 10. Could you direct your attention to the paragraph on page 364 which starts with the word "Later," and read it to yourself first.

(Pause.)

A Yes.

Q The question I want to ask you about it is, is the material in that paragraph starting with the word "Later" and through the phrase, "I had never seen anyone closer to death," newsworthy information as it is presented in The Nation article?

A Yes, it is. And it's partly newsworthy because of the contact between any publication -- not The Nation, but particularly continuing daily publications and the readership. Journalism, news, I think, is a kind of running and by definition somewhat inaccurate representation of history as it goes by. So that part [356] of the obligation of the people in the business is to continually update on what later

turned out to be -- you see it every day in the papers -- what later, what you once reported, believing to be the truth -- not truth, that is a strong word -- believing to be accurate, later finding out it was not quite accurate. If you are fulfilling your real obligation to the people who read you, you try to keep those things in line, to give them -- to update those past pictures which were really snapshots of the parade as it went by.

Q But is it newsworthy if you publish it and you don't contrast it within the article itself with what President Ford may have said earlier?

A Well, I would have contrasted it. But that's -- I didn't understand the -- I now understand what the question was.

Q That is what Judge Owen was asking you.

A Yes. I brought knowledge, obviously -- yes, I brought knowledge to this situation that other readers might not. I personally would have contrasted it if I used that bit, I would have used that bit too.

THE COURT: Suppose you used that bit and had no knowledge of the possible contrast?

THE WITNESS: Well, I might not have used [357] it if I didn't have knowledge of that --

THE COURT: Of the contrast?

THE WITNESS: Yes.

Q Have you a view as to whether the precise fashion it was used in The Nation article, starting with the word

"Later" and winding up with "I had never seen anyone closer to death" is itself one appropriate way to deal with this?

A Yes. I mean, it's another person's judgment. I mean, my judgment would have been different, but that doesn't --

THE COURT: To deal with what?

MR. ABRAMS: To disclose the information, your Honor.

THE COURT: I'm not sure in what context you are asking it.

MR. ABRAMS: I am asking the witness whether notwithstanding the fact that he has told you in response to your questions how he would have treated this particular topic if he has a professional judgment as to the treatment given it here. I certainly didn't call Mr. Reeves --

THE COURT: No, but I gather Mr. Reeves, by his very last answer to me, has indicated that if he hadn't -- had no awareness of the potential contrast he [358] would not have run this paragraph, which is what he told me.

MR. ABRAMS: I think he said he might not have run it.

THE COURT: No, I think he said he probably would not have run it. His answer, therefore, suggests that he does not regard it as that newsworthy --

THE WITNESS: I agree with the first part of what you said. If I did not have that knowledge, I might not have run that paragraph.

THE COURT: Right.

THE WITNESS: But I do think -- I mean, the paragraph is newsworthy. I

did have that knowledge. So did most of the American people.

THE COURT: You are sort of coming in the back door, having gone out the front. All right, go ahead.

Q Why don't we take the article part by part, Mr. Reeves.

A I can look at it.

Q Yes. And go through it. I am going to ask you as to the various elements in it whether you consider the material there newsworthy as of April, 1977. You have already dealt with the disclosure by President Ford [359] that he might have selected Ronald Reagan as his 1976 running mate, but for a misunderstanding. I am now referring to page 1 of the article. What about the statement that Edward Bennett Williams,

a Democrat, was President Ford's choice for head of CIA?

A You know, I don't think that that is major news, but it is news. It is certainly interesting. And probably it falls within the definition of what people need to know. They certainly need to know that -- you've got to remember that at that time Edward Bennett Williams was treasurer of the Democratic Party, so that it certainly gives people an idea of how Washington really works at a place. So I would think -- I don't think it's a major revelation, but I certainly think it's news. [360]

Q What about the statement that Nixon was the one who first proposed Nelson Rockefeller for vice president

and that President Ford regretted his cowardice in allowing Rockefeller to remove himself from the vice presidential contention?

A I found that -- I don't know if this is responsive. I thought that was news and had a lot to do with current politics. In the first place, that was a revolution -- a revelation. To my knowledge, no one knew that Nixon had proposed Rockefeller or that Ford regretted that. The fact that Ford regretted it is interesting in a lot of contexts, including the fact his running mate was Robert Dole. Ford is essentially saying, to me at least, that if I had stuck with Rockefeller I would have been reelected, and it was an attack on Dole, who also was then a -- I think by

this time Dole had already announced his candidacy for President of the United States.

Q Turning now to the description in the number of paragraphs that followed about the pardon of President Nixon by President Ford, and your view as to the newsworthiness of the material contained in those paragraphs.

A I thought they were newsworthy. Some of it was repetition of what Ford had said before the Judiciary Committee. What was not repetition --

[361]THE COURT: Where are the minutes? Do you have the Senate minutes, the House transcript?

MR. MILLER: It's Exhibit 15.

A I suppose, like a lot of other reporters covering it at the time, I

felt in some way some sort of clearing of the record when Ford admits in the book for the first time that when he went to Jackson, Mississippi -- it says here Michigan, by the way, it was Jackson, Mississippi -- and when Ford said he went down after knowing specifics from the tapes of what later came to be called the smoking gun, at the time. And my memory is before the Judiciary Committee, Ford took the position that he only had third-person or hearsay or what not, that he didn't directly know of the evidence and therefore that was his justification for what he did in Jackson. In the book he says that, "I didn't want the whole thing to come tumbling down," which to me at least in evaluating his character, which is part

of my own professional role, was a significant admission, and also underscored the fact that Gerald Ford was not this naif stumbling across the countryside. He was an intelligent, calculating American politican who was in control of himself and his circumstances, which is the picture he presents in the book. [362]

That was not the picture he presented at the time. At the time it was kind of, well, gee, I really didn't know, because I only had Haig's word for it. I had not seen it myself. In the book, it was clear he knew what was going on and he made a decision to tell the people at Jackson something other than what was going on.

Q Are there other elements of the discussion in The Nation article

with respect to the pardon which seemed to you particularly matters of new disclosures?

A I don't know of new disclosures. There may be, and my memory may fail me on some of the things. The picture in the book, and the picture which is presented here, makes clear, at least to me, one reader, and it would if I were an editor of a paper planning to come out the next day, that Gerald Ford had been informed of the pardon, that the negotiations on the pardon -- it wasn't only the subject had been broached, that in fact for all practical purposes there were negotiations and some assurances were passed. Which is why Bob Hartmann, this is all new information, the fact that Ford had these

meetings and what not and then decided to come back with a written statement saying, "I don't know anything. Don't hold me to anything. I want that on the record [363] and I have written that down."

That's all new information and is not the portrayal of a man having a casual conversation with Alexander Haig. I mean, this was in the language that politicians use, and in the moves they go through, this was as far as I was concerned a negotiation and it was revealed for the first time -- it was admitted to for the first time. It was believed by some before that.

Q When you refer to Mr. Hartmann you mean the conversation between President Ford --

A The conversations with Bob Hartmann, John Marsh, and so forth, which were new information. That Ford clearly understood the import of that meeting with Haig. He clearly understood that the pardon was not talked about in passing, that list of options. Because, after all, when he then went back to meet with his own people he didn't say, "let's talk about this list of options." It becomes apparent from the book that he talked about the pardon. They are talking pardon. "What should I do?" His people then said, "Well, what have you done?" He said, "Well, I talked about it." They said, "You have to say" -- and obviously the whole thing was gone into then. [364]

That is a different picture, I

think. I think that is news, and it is news in an obviously important event to Americans who lived through that period, and Gerald Ford's whole political career in 1979 and in 1980, and now in 1982, revolves around that incident. There have been other books written. One of the books written about Ford was just titled "The Man who Pardoned Nixon." And people knew enough to know who that was about. It is a critical -- I mean, his life is going to turn for better or worse on that decision he made, so the way he made it is pretty compelling stuff, interesting and news.

Q Could you direct your attention in the article to page 364, which is the second page from the end, and to the description of the conversation

between Mr. Ford and Secretary Kissinger at the bottom of page 364. Have you a judgment as to whether that material is newsworthy?

A It is. There are two things. I mean, it sheds a little light on Kissinger, who obviously is an important individual in the way Americans live. And also the discussion in the manuscript which isn't gone into very deeply here about that Kissinger-Schlesinger relationship. [365] Who fired whom? Who was the winner, who was the loser? What did that reorganization really mean? Obviously, all of us can never know enough about Henry Kissinger, because there is always that chance that he will be running the foreign policy of the nation again.

Q Is information of this sort about Mr. Kissinger relevant information in 1979?

A Yes. Kissinger is certainly within that group of people who people need to know about, and then the resonance of some of these things -- I mean, Kissinger was the key figure in what then became the Reagan-Ford negotiation in 1980. It was Henry Kissinger who was pushing the Ford vice presidency in Detroit in 1980, which is a continuation of this. All of these events are central to the leadership decisions of the Republican Party, which, as we know, runs the country at the moment, politically runs the presidency and one house of Congress.

Q What about the material on --

A These are important events.

Q I'm sorry.

A I mean -- I suppose a well-informed voter might not necessarily have to know them all, but would [366] want to know them if they were going to evaluate do I want Henry Kissinger to be the Secretary of State of the United States, do I want to push a candidacy which will lead to a Kissinger stewardship?

Q What candidacy is that?

A The Ford candidacy of 1980.

Q What about the material on John Connally in the right column?

A The same thing. John Connally was then running for President of the United States. The fact he had this past implicit endorsement of Connally,

and Ford's at least passive acquiescence, is very important in public decisionmaking.

Q And the material entitled "On the decision to run again"?

A Well, it has certain news value in that it indicates Ford was sincere, which many people -- he was attacked because he had announced that he wouldn't run again when he was vice president, he had announced he would never. So it tells a little about that. To me it is newsworthy again because it sheds light on Kissinger, and the fact that I took this to mean, and I took Ford as understanding it, too, in the book that Kissinger essentially was trying to promote the Ford [367] presidency and Ford strength to preserve his own position.

Q The material on David Kennerly, the White House photographer?

A Well, I found it fascinating. I thought that that was a valuable civics lesson for the country, that that in fact is how decision-making is made. Also, Dave Kennerly is a friend of mine. I didn't know he had that much influence. I also thought he made the right decision. My own view of what is newsworthy is that in a democracy it is extremely important for people to know how decision-making is actually made and if the President feels this was key to his thinking, so I found -- [368]

THE COURT: Are you drawing from that incident the fact that a White House photographer is in fact making all the big decisions in the Ford Administration?

A No, but I am drawing from it that people gather where life is at stake and national policies and what not -- gather and have no outside input at all and often consider the narrowest of extreme options, do nothing or attack massively, and that the decision-making processes tightly held often lead to that kind of polarized debate. Suddenly someone walks by and says, "Look, why don't you" -- and they say, "Yes." I don't think Kennerly made decisions in that administration, but it shows the danger of any of us making decisions in that kind of closed circle.

THE COURT: That could happen with any president at any time?

A Indeed, and that's illustrative. I am sure it has and can and

will. I think that that piece of news is more than most persons learn about presidential decision-making in high schools. I find that an extremely valuable object lesson in decision-making in a democracy.

THE COURT: You know, I am reminded of that very famous story that appeared in Reader's Digest. [369] Probably in the thirties is the first time I heard of it. The truck that had gotten wedged under a bridge and everybody was sitting around trying to figure out how to get this truck out from under the bridge, such as wedging the bridge up a little bit and people standing on the top of the truck to try to push it down and finally some ten-year-old boy walks by and says, "Why don't you let some air out of the tires?"

A I think it's the same story.

THE COURT: It's the identical story.

A But if they roped off the area and only Gerald Ford, Henry Kissinger and James Schlesinger were let near the truck, they would have blown up the bridge.

THE COURT: Well, that may be. On the other hand, you don't get the impression from this that this photographer was any less cut off from the outside world than anybody else because he, too, was part of the inside circle.

A I don't think that --

THE COURT: Both you and Professor Friendly put some emphasis on this, and I am just utterly unimpressed with the fact this is other than a fresh view

that happened to come in from somebody that could have come in from somebody else. [370]

THE WITNESS: I did not know, obviously --

THE COURT: So I don't see the impact of that at all.

THE WITNESS: I don't know if that adds one way or another. I did not know that he had said that. But I think that Gerald Ford is also on our side. I think that's why he wanted to tell that and he can do it to point up the danger of not having that type of fresh air or not having the ten-year-old walk by.

THE COURT: All right. You have stated flat out this shows how decisions are made in the White House and I just didn't draw that conclusion from it at

all. I regarded that as a human interest story, something where somebody happened to bring a brand new perspective to it that others had up to that point certainly missed. Maybe at some point somebody would have come up with that on their own.

A This is really off the subject but I would take it, and I think Ford meant it as a parable on the dangers of tightly held decision-making, and I took it as a very kind of positive example. I mean the other options they were discussing that night could have led to some very horrible consequences over what may well have been an inconsequential incident. [371] I think that was my impression, that Ford was projecting that as an object lesson for the rest of us.

THE COURT: Let me turn to something that I have been sort of also scanning here as we go along. I have before me the President's book at pages 4 and 5. I have the Hungate Hearings, Exhibit B at pages 94 and 95, and I have The Nation article at page 363. Now, I gather that one of the things that you regard as newsworthy is the fact of his calling up Haig, having been given Haig's various options in a face-to-face confrontation which he says came to him as quite a shock --

MR. ABRAMS: I respectfully object. I really don't believe, and I don't want to prompt you or lead the witness, but it was not my recollection that the witness had said that he did not know that the president had called Haig. I thought --

THE COURT: I understand that. I accept the fact that he knew the President had called Haig. Now, if you read the Hungate Hearings you get all of the options that are mentioned in the book.

THE WITNESS: Right.

THE COURT: So when the book comes out [372] the fact of the options has been public knowledge since 1974.

THE WITNESS: Right.

THE COURT: That's five years earlier. You get from the Hungate Hearings the fact that he told Haig he wanted some time to think and did not say anything in response to Haig's proposals of the options, including that there might be a pardon to the President should he resign.

THE WITNESS: Right.

THE COURT: You get the fact that he talked to St. Clair and St. Clair said really nothing to him except that he was not the source of the option to trade a pardon for a resignation. In the Hungate Hearings President Ford says "After thought on the matter I was determined not to make any recommendations to President Nixon's resignation. I had not given any advice or recommendations in my conversations with his aides" -- which I assume included Haig -- "and I also did not want anyone who might talk to the President" -- and that I assume was Haig -- "to suggest that I had some intention to do so." Now, the book, although it fleshes out talking to --

[373]

A Hartmann and Marsh.

THE COURT: Hartmann. Suggests that the call to Haig was motivated by Hartmann saying, in effect, "Mr. Vice President, you may not appreciate how this is going to land on the other end, and I think you ought to say something about it." But except for the fact that Hartmann is the instigator of the call everything else is in the Hungate Hearings.

THE WITNESS: This is just a matter of judgment. My feeling is what was not in that hearing was -- for instance in the book he quotes Hartmann as saying -- his chief aide as saying -- "Mr. Vice President, you just agreed to pardon the President." "Silence implies assent," is the quote in the book, as I recall.

THE COURT: No, you are a little

stronger than the book. The book reads he said, "He (Haig) probably went back to the White House and told Nixon that he had mentioned the idea and you weren't uncomfortable with it." That is, as I read it, the high water mark. And suggested that he had an obligation at that point to make it perfectly clear that he wasn't going [374] along with it.

Omitting that, Ford says in the Hungate Hearing, "After thought on the matter" -- which doesn't necessarily preclude his having talked to Hartmann -- "After thought on the matter I was determined not to make a recommendation, and I didn't want anybody who might talk to the President to suggest I had some intention to do so." That's exactly

what the book says he did, and what I am getting to you is, what I am suggesting to you in the form of a dialogue between us, is what about the book -- and I am using the book and the manuscript which is used for The Nation article interchangeably at this point -- what about the book has become such news as to require a court to permit this to be a fair use, permit The Nation's article to be a fair use of an obviously copyrightable or to be copyrighted document, to avoid the copyright protection that initially attached and has to be set aside for some valid reason? What's the fact that he talked to Hartmann, what about that is the great piece of news, because that's the only thing I see in here that is a difference?

THE WITNESS: Obviously I can't answer a what-about question. I can only say that if it were [375] me, and I had that on my hands, I would have published it, and I think almost everybody else in American journalism would have done the same thing, and I think that their view would have been that this clarifies the issue of did -- which I felt, and this may be different readings from having sat at the Hungate Hearings, having written about them, having written a book about them, that Ford was taking the position that he didn't understand out of those conversations that the pardon was the clear issue, and also there was a lot of backgrounding going on at that time by his people that this was just one of the things talked

about. It seemed clear to me from the manuscript of the book and the book itself that Ford knew exactly what the issue of those conversations was. The issue was, was Richard Nixon going to be pardoned.

It may be two people's reading of the same words, or seeing the same scene, but that's what I thought had changed in four years between the hearings and the book, and that it clarified in my mind as an observer that Ford has now conceded he knew what was going on in those conversations, and that's that what the subject really was. It wasn't a list of options. It wasn't a long conversation. That the key point of those conversations [376] was that pardon. That's what he went back and

talked to his own people about, and that's what he called the White House back about. [377]

THE COURT: And I take it that it's on that nuance between the book and the Hungate Hearing that you say that in your expert opinion the revelations of the book have become sufficiently newsworthy to justify its publication by somebody, at least arguably in violation of the copyright laws?

MR. ABRAMS: I object to the form of the question.

THE COURT: The objection is overruled.

THE WITNESS: For better or worse, those nuances are the stuff of which the news business makes decisions. It is an editor's judgment as to which of those

nuances are important to the people who read my journal, watch my show, vote in this country: Is that nuance important to them? My professional judgment is yes, it is. Each editor makes that decision at a given time. There may be disagreements among them, but there tends to be some kind of -- as we talked earlier, some kind of consensus comes out across the country.

THE COURT: And just fleshing out what Mr. Abrams has said, because I don't want there to be any question in our dialogue as to what we are talking about, the nuance that I see is as between the Hungate Hearing and the book, you say it has been made clear [378] that when he called Haig back, he was talking about the pardon and nothing

else? And what the Hungate Hearing did not make clear that he was talking about the pardon as opposed to talking collectively about the six options that he had been given.

THE WITNESS: The Hungate Hearing and the interviews that were being given by Ford's staff at the time -- the Hungate Hearings were only part of an event as seen by journalists. Because we were being called into the White House to be briefed at the same time by Bob Hartmann and other people, saying, this is what it really means; because the White House at that time was trying to get, my memory and my opinion is, the White House at that time was trying to get across the impression that the pardon discussion was no big deal in the

context of these conversations. Five years later, when it seemed to make less difference, it seems to me the former president in his book was willing to concede the point that perhaps it was more central within that context.

THE COURT: Even here now, you have watered it down --

THE WITNESS: I am trying to use judicious language. [379]

THE COURT: I know, and I want you to use careful language because I am using careful language on you. You used the expression he conceded that perhaps it was more important than he saw at the time.

THE WITNESS: I would take out the "perhaps".

THE COURT: Why did you use it in the first place?

THE WITNESS: But I would add, in my mind, in my observance he is now willing to concede something he was not in 1974.

THE COURT: You see, in the book, he doesn't concede that he had an awareness of the focus of the pardon issue until he first talked to Hartmann. So that when he left -- when Haig left and he started talking to people about what should be my position vis-a-vis what I have heard, Hartmann is rather critical of the fact he did not have a witness in the room, and Ford says, "What do you mean?" And the answer is "The last option Haig mentioned was that Nixon resign and in return for an agreement that he receive a pardon from the new president. I don't like that at all."

"To which Mr. Ford says, 'But Bob, Al wasn't suggesting that. It was just one of the ideas he said were being kicked around by people at the White [380] House.'" So even in the book he has not yet come to an awareness of the fact that that's the focus. So the only time this focus, this nuance that we are talking about, comes into effect is when Hartmann thereafter points out to him a misconstruction that might be placed upon his silence with regard to that one option. Right? I am saying to you that reading Hungate versus this section of the book, the only difference between Hungate and the book is between the time Hartmann speaks to him and he speaks with a couple of other people and makes his call to Haig. Otherwise, Hungate has everything in it this book has.

MR. ABRAMS: I object to the form of the question.

THE COURT: The witness was at Hungate and the materials are here and you are at liberty to look, and I looked at the pages. I trust I can read as well as the next man.

THE WITNESS: I'm not sure I understand the question.

THE COURT: Well, the question is, what becomes newsworthy about this to have you say to me that a person's copyright rights in a document should be violated without consideration by an editor who happens to look [381] at the typescript of this manuscript and says, I am going to go publish --

MR. ABRAMS: I object to the form.

THE COURT: When it is in fact already --

MR. ABRAMS: The witness has not so testified. The witness has given no testimony about the copyright law or overcoming the copyright law. That is a legal issue.

THE COURT: I know he hasn't, Mr. Abrams. And he said he wouldn't have given the copyright laws a thought, although as a book publisher, as a book author he is aware that books have copyrights. He said he would have paid no attention to the copyright laws at all, he would have published. And I am trying to ask him what it was that he considers news here that would put him in the frame of mind, I am going to go ahead, and frankly I wouldn't even have thought about the copyright. I want to know what it is that inspires him to do that.

THE WITNESS: I have said what I thought it was. But in my mind, by the way, it doesn't make any difference whether my judgment was good or bad in deciding to publish. I mean, to me it seems quite a different question about whether an editor's judgment in a given situation is good or bad. That that does [382] not necessarily go to the principles of the fact that that's what his editor does, and it is his role, and a honorable one, to make those judgments, well or badly. I mean, editors decide what will be published in their publication. They may make mistakes in doing that, but that doesn't mean they don't have the right and duty to do it. I may be quite wrong in my interpretation of this.

THE COURT: Are you saying that arguably in this situation there may have been a mistake in the publication of this particular section we are talking about?

THE WITNESS: Well, there may be a mistake in my interpretation of this material. There may have been a mistake in this editor's, the editor of The Nation's, judgment of that material. That does not to me affect my own view of whether or not the editor should publish what he or she thinks is newsworthy.

THE COURT: Even at the risk of suffering the penalties that would flow from the mistake.

THE WITNESS: That is what publish and be damned means.

THE COURT: All right.

Q Mr. Reeves, you have testified that if [383] you had received this manuscript you would have written a story about it. What if you had known that two weeks later Time Magazine was going to excerpt portions of the manuscript? Would that have affected your judgment?

A No.

Q Why not?

A They run their magazine, I run mine. They want to pay for things, they want to make -- I have nothing to do with them. It might confirm for me that this is in fact newsworthy material, if they are willing to pay for it. But other than that, it wouldn't have any effect.

MR. ABRAMS: I have no other questions, your Honor.

THE COURT: We will take a recess. Are you going to cross examine?

MR. ZISSU: No, I am going to have to wait on that one, too.

* * *

[384]

DAVID HALBERSTAM, called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ABRAMS:

Q Mr. Halberstam, what is your occupation, please?

A I am a reporter and author, or both, whichever.

Q What is your education?

A I have a BA degree from

Harvard and subsequently some honorary degrees. But I just have one -- I have an undergraduate degree.

Q Your AB was in what year, please?

A 1955.

Q From where did you get your honorary degrees that you mentioned?

A Wesleyan College, Wake Forest in the Chicago area, Knox College, and Columbia College in Chicago, and a couple of others.

Q What was your first position after your graduation from college?

A I was the one reporter for the smallest [385] daily in Mississippi in 1955 and '56.

Q What was the name of that paper?

A It was the West Pointe Mississippi Daily Times Leader.

Q What did you do on that paper?

A I was the one reporter. I covered everthing tht there was to cover in West Pointe: politics, race, county agents, I became an authority, so to speak, on cotton, soybeans, beef cattle, and the running of a small town of 8,000 people.

Q What was you next position?

A I went from there to work for four years as a reporter for the Nashville Tennesseean in Nashville, Tennessee.

Q What did you cover there?

A I covered general assignments, police reporter, courts, and really essentially politics and race, because

it was from 1956 through 1960, which was a time of heightening civil rights consciousness.

Q Then what did you do after you left the Nashville Tennesseean?

A I went to work for the New York Times where I worked primarily as a foreign correspondent.

Q What was your first assignment with the Times? [386]

A I was sent to what was then the Congo and is now Zaire, where I worked I guess for about a year and a half under fairly volatile circumstances.

Q What was your next assignment?

A I was the New York Times -- I was the first permanent correspondent of any American newspaper in Vietnam.

Q When was that?

A 1962, '63, and into '64.

Q Where were you assigned next?

A Came back here for a year as a general assignment reporter and then became a correspondent in Eastern Europe based in Poland, traveling in Czechoslovakia, Hungary and Poland, where I stayed for about a year until I was expelled.

Q Why were you expelled from Poland?

A Well, I am an assertive and aggressive reporter and I am contentious, and I was many of the things which have now come to a head in terms of Solidarity were there, but slightly below the surface, but they were profoundly affecting that society. And one

could not be a reporter of conscience without reporting on them, and that put me -- the economic malaise, some of the anti-semitism, these things, were profoundly part [387] of the story and I was writing about them and that put me in an automatic collision course with the repressive government there. [388]

Q After your expulsion from Poland, what did you do next?

A I came home --

Q You were still with the New York Times?

A With the New York Times. I spent about six months in Paris, where I did not ennoble my reputation, came home, worked briefly in New York for a time, finished a novel, and in the Spring of 1967 became a contributing editor of Harper's Magazine.

Q How long did you serve as a contributing editor?

A I spent four very happy years there.

Q What did you do as a contributing editor?

A I was what is called a contract writer. I was supposed to do, I think, six pieces a year. In addition, I sort of functioned as a, I guess you would call national editor. I was almost an assignment editor, trying to figure out who we should get writing for a magazine and what articles. For example, when Bill Moyers had just left, not just the government, but Newsday, I think he had been sort of cut asunder by Capt. Guggenheim there. I thought, here's a bright, talented man who has

been in a high position in our society. Why don't we get him to just travel around the country and interview and do a piece on ordinary persons [389] and his feel for the country, and we published that, which also became a book. I think it was entitled, in fact, "Listening to America."

Q You were at Harper's for four years?

A Four years, yes.

Q Until what year?

A I left there in 1971, as I recall, the spring of '71, and went on to become a full time writer of books.

Q What books had you written before you left Harper's?

A I had written a book on the darkening cloud in Vietnam called --

that was written in '64 and published in early '66, called "The Making of a Quagmire." I subsequently wrote a novel on Vietnam, called "One Very Hot Day." I wrote a book about the turbulence in America in 1968, which I had considered a short of watershed year of all the social conflict. It was about Bobby Kennedy as well, it was called "The Unfinished Odyssey of Robert Kennedy." And then in 19, I guess it was '69 or '70 -- '70, maybe, I wrote a very small essay biography of Ho Chi Minh, called "Ho."

Q When you left Harper's to become a full time [390] author of books, what books did you write?

A Well, the first one that came out in the time when I was a full time

author was a book of how and why we went to war in Vietnam, and it was called, "The Best and the Brightest."

Q In what year was that published?

A It was published in the fall of 1972.

Q What was your next book?

A I did a long book on the rise of the new modern media machinery in America and how it makes its decisions and how it affects our society, and that was called "The Powers That Be."

Q Did you focus on a particular media or corporations in that book?

A Yes. Particularly it was about the rise of what television has done to us in general. But I focused I think on really four or five major

institutions: CBS, the Los Angeles Times, Time Magazine, the Washington Post, and to a somewhat lesser degree, the New York Times.

Q And have you more recently published a book?

A I have a book out which hangs on and off the lower rungs of the best seller list. It is a book in effect different from most of what I have done. It is on a season in commercial sports and it's out now called, "The [391] Breaks of the Game."

Q Is that about professional basketball?

A It's a season in professional basketball, yes.

Q Have you won any awards, Mr. Halberstam?

A Yes, I have won some minor awards in Tennessee. When I was in the Congo in 1961 I was nominated for the Pultizer, but did not win it. And I won instead something called the Page One Award of the Newspaper Guild. And then I won a number of awards for my reporting in Vietnam and subsequently.

Q Did you win the Pulitzer Prize?

A Yes, I won the Pulitzer Prize for the reporting in Vietnam in 1963, and I won an award which I am very proud of, put out by the Nieman Fellows in Harvard, who are senior journalists who go there for a year, called the Louis Lyons Award, it's given for conscience and integrity in journalism. I think I won a George Polk Award and a couple of

other awards in the Vietnam war as well. And I subsequently won some minor awards for my books, and I am very proud of the fact that both were nominated for National Book Awards, which is considered -- the nomination for National Book Award is considered almost like an award.

Q By both books, you mean "The Best and the [392] Brightest"?

A "The Best and the Brightest" and "The Powers That Be," yes.

Q In your capacity as journalist, did you have occasion to focus on what is newsworthy and what is not?

A Yes. I think it's really part of my life, and I have grown up sitting there trying to figure out what is news, talking about it, arguing about it,

being a part of it. I think one of the things I liked about being a foreign correspondent, when you were the one New York Times man in all of Central Africa or when you were the New York Times man in the very important story like Vietnam, you were not just a reporter, but in effect you were a managing editor. You were your own managing editor. You had to anticipate what was news, think about it, and think about how to dramatize that, because -- the foreign editor would never say, "I'd like a story on." So you were sitting there in effect doing your own assignments. You were figuring out. And I liked that. Since I have left daily journalism, it's been a continuing interest of mine and in fact, when I did

"The Powers That Be", one of the things that that book centers on is the decision of news, what is news, the decisions that the [393] New York Times or the Washington Post or CBS made in running stories either in Vietnam or in Watergate or over civil rights.

Q Have you read the Nation article of April 7, 1979 entitled "The Ford Memoirs: Behind the Nixon Pardon"?

A Yes, I have.

Q When did you first read it?

A I have a memory of reading it in sort of the small contretemps that followed when it came out I guess a couple of years ago.

Q Have you reread it in preparation for your testimony today?

A I have read it quite carefully since.

Q Have you also read a typed copy of Chapters 1 and 3 of the manuscript of President Ford?

A I have read much of the manuscript beyond just 1 and 3. I have gone back and I haven't read the whole manuscript, but I have tried to familiarize myself with the larger book. Not just the "news" but a sense of the texture of that book, because I think that is a crucial word in all this.

Q That is the book itself, by President Ford?

A Yes.

Q In reading the manuscript and the text of [394] President Ford's book "A Time to Heal", did you come to any judgments about whether there was newsworthy material in there?

A I think it's quite newsworthy, yes. I think that there is news in a presidential document like that. That is a presidential document. That is not just a book. I mean, those are not just impressions of a citizen about the world around him. That is the witness, and I mean upper case W, of a President of the United States about the most important events of his presidency. And that is news.

Q Were there particular portions that seemed especially newsworthy to you?

A Well, we come to this with prejudgment. I mean, I don't come as an innocent because there is already the hoopla. I mean, we are preceded by a history of the Nation article. But my

sense is coming in on it that I very strongly calibrate and would authenticate Mr. Navasky's judgment of what the central news of that document is.

Q What is that?

A Well, I think it is about the pardon. I think that is a crucial event of the Ford presidency; not just a crucial event of the Ford presidency, but in fact a surpassing event of the last 20, 25 years [395] in American politics. You have to go back to the time of Andrew Johnson, when to have impeachment proceedings hanging so heavily upon our society, the texture of the nation stretched so thin, a president comes in, will his predecessor be fully impeached, will the legal proceedings continue?

Instead, the new president,

who is viewed as a sort of breath of fresh air in all this traumatic experience of Watergate, pardons him. Because of his pardon, or at least in part because of his pardon, the new president has a great deal of problem being elected thereafter. So it is a great deal of important news and historical decision.

Q I would like to direct your attention to the Nation article itself, Mr. Halberstam, and to ask you some questions about the specific material contained therein, and I would like to put before you first Plaintiffs' Exhibit 10, which is a copy of the article. That is the article that you have read, Mr. Halberstam?

A Yes. Excuse me. Yes.

Q I want to take you through it part by part; and if you direct your attention first to page 1 of the article, the statement is contained there that "But for [396] a misunderstanding, President Ford might have selected Ronald Reagan as his 1976 running mate." Do you consider that a newsworthy disclosure?

A Well, it's newsworthy. It's not as paramount as the news about the pardon and the description of the process of the pardon. It's certainly newsworthy, for after all, we have Mr. Ford, who is an ongoing politician, talking about decision A, about Mr. Rockefeller, whom if he had named as vice president might have been reelected. I think in his own opinion, I

think he shows in his book that if he had kept Rockefeller he would have been reelected, instead of Dole. That is very newsworthy.

And what he says about Mr. Reagan, who was then very much a man hovering slightly off center stage, but was there as a potential presidential figure. I mean, a man - one was aware in 1979 that Ronald Reagan fully intended to run for the presidency, what the one said about the other, since there was a constant undercurrent of sense of bad feeling about the two. I mean, it would come out from time to time in fact there was not a great amicability between them. What he says about that, I think is clearly news, yes. [397]

Q What about the reference, Mr. Halberstam, to the fact that President Ford had as his choice for head of CIA Edward Bennett Williams?

A Well, that's news, I think. It's always in the eye of the beholder. And Ed Williams is certainly a major figure, a great wheeler-dealer in the sort of Clark Clifford tradition, and the idea he would take a major Democrat and put him at the CIA is above the level of titillation, it is news, and falls below the powerful, I think, series of things that came out on the pardon, which I put at a far higher scale.

Q As regards the pardon, Mr. Halberstam, and the material in the article about the pardon, can you tell us why that is newsworthy?

A Well, I think people are going to be arguing about the pardon and about Watergate for a hundred years. Here is the man who made the pardon, which possibly cost him his reelection, and it is his most important final -- I would say his final witness, when a man publishes his book that is his final witness, so that is his signing off on it, and it is an enormously important moment in American history.

In addition, in terms of news it is the word of Gerald Ford, a once and possibly would be again presidential [398] contender, because at this time it was very clear that he was letting people know that he would in fact like to run again. It involves, and I think this is possibly the most important news

-- and I underline the word "news" -- it involves the role of General Haig, who was at that moment making very clear that he wanted to come back -- I believe he was still at NATO -- come back and run for the presidency. He was leaking to selected columnists who would visit him in Brussels that he would think of an Eisenhower-like return -- and who is, in fact, a major player and remains a major player. And it is also about Richard Nixon, who is a major player in our ongoing national dilemma who even to this day -- I mean, Watergate did not end the public career of Richard Nixon. Even since this has happened he has gone to the funeral of Sadat and he departed that, apparently unbeknownst to the President, to visit Saudi Arabia, a suprise to the Secretary of State, as a representative of the United States.

These are three major players. Particularly with respect to General Haig, the new light is about him, and he is a very important man, and we know one of the things that helped him get the job as Secretary of State, [399] according to the news reports since then, was the recommendation of former ex-President Nixon. So this is very germane.

Q Is it newsworthy, Mr. Halberstam, the description of the pardon here, if in fact good parts of what is contained here were already set forth by President Ford in the Hungate Committee hearings?

A I have not a wildly clear

memory of the Hungate hearings, and it is possible that parts here overlap, but it seems to me I have no memory at all of Haig's role ever being so clear, clearly defined. I think the thing about General Haig coming in, Mr. Ford is obviously a very nice man going along with it and Hartmann saying, "You have made a mistake." What is the phrase, "Your silence can be interpreted as acquiescence"?

THE COURT: "Silence implies assent."

THE WITNESS: That is very important.

A I don't think that is in the Hungate hearings at all.

Q Why is it important?

A Why is it important?

Q Yes.

A The role of Mr. Haig in all this is very important, very controversial and still being debated. What role [400] was he in? I think it's implied to some people he was anti-Nixon, was trying to hold the country together and thought Mr. Nixon was no longer coherent. There is a real implication that Mr. Haig in fact it seems to me is bartering for Mr. Nixon in this case, or at least is interpreted certainly by Mr. Hartmann, a very shrewd insider on Mr. Ford's staff, that he is bartering for Mr. Nixon, since Mr. Haig has continued to be a major player in our society, a great internal bureaucrat. How quickly he has come up the ranks. How did Alexander Haig rise so quickly,

is a question. He is our Secretary of State. He has wanted to run for the presidency. It's possible that he will run again. He's very important. And what his role in that moment was is something terribly important.

Q I would like you to direct your attention to a passage on page 364 of the Nation article, Mr. Halberstam, in which President Ford describes how President Nixon looked.

THE COURT: Before we do that, can I just ask one question. Assume for a moment, Mr. Halberstam, and accept this as an assumption, that virtually everything that [401] appeared in President Ford's book as to General Haig at this particular juncture, this meeting about the pardon -- assume that that had all

been revealed by President Ford in testimony before the Hungate Committee. Would that change your view as to the, quote, newsworthiness of the repetition of General Haig's participation as it is revealed in the book?

THE WITNESS: I don't thing so, your Honor. I think perceptions of news, even when there are -- when part of it has been in the record or perhaps even all of it has been in the record.

THE COURT: Assume all of it has been in the record.

THE WITNESS: Even if all of it has been in the record the fact that this is a presidential document, this is Gerald Ford's own witness, his final summing up, not when he is before a committee or he is still an active officer with the

limits that that places upon him, but that this is his summing up, it's a presidential document, it is a state paper. It makes it news. You know news can be news even if, with all due respect, it is not news. There is a fascinating moment in the last few days which was in the paper today. An ongoing conflict, a CBS documentary about General [402] Westmoreland's allegedly tampering with his own intelligence staff when he was the commander of the American intelligence forces in Vietnam.

There was a documentary done Saturday night by a CBS young man named George Cryle, and it pointed out that Westmoreland had taken the figures of men like General Mack Chrisman's

intelligence man and George Arlen, his top man over there, and brought them down for whatever debatable reasons. That's news, and it is a very big story. It's in the Times and other papers. That was in my book nine years ago on Vietnam. But it's still news. For some reason it has come out because the debate continues.

Q Would it still be news if General Westmoreland held a press conference to deny the charges as he did nine years ago?

A Yes, it's still news because it has come out again. I mean, it's come out and somebody else has taken a slightly different thinking. Another reporter has come upon it. Maybe they chose not to -- maybe I did it in my

book, nobody picked up on it, and suddenly somebody from CBS stumbled upon it and said, that's a story and we can do it and it's news. It's still news.

Q Why is it still news? [403]

A It's in the eye of the beholder because the debate is continuing and because someone perceives it to be news. News is not an absolute thing. It's a judgment of a professional. Maybe the time has come, a certain moment, when they are really ready to do it. Maybe they only see it, maybe it only gels to them as news. Maybe they think the debate has changed, there is now a new burst of revisionism on Vietnam and therefore something like this adds to the debate.

Debate changes. Definitions of

society change. If we had looked on this particular article three years ago we might have looked upon it differently because Ronald Reagan might have been a peripheral player then, Alexander Haig might have seemed a smaller figure. The debate goes on and the debate changes, and news is a reflection of different trends in public affairs. One never knows with absolute certainty what else is added or how people will perceive the same set of facts.

Q As of 1979, in your view, did the debate continue about the pardon of President Nixon?

A Oh, yes. Oh, sure. I think it was the single issue that hung over a year later. I think it's the single most important issue that hung over

Gerald Ford's presidency, [404] and I think one of the things Mr. Navasky points out in his reporting of this is a sense of Gerald Ford coming to terms with that decision that he was damned if he did and damned if he didn't. That if he didn't pardon Richard Nixon, he was going to have his presidency exhausted by these kinds of ongoing distractions, that the center stage would not be his and his presidency, but it would be going over to the ongoing debate over Nixon, the pardon, and Mr. Nixon's own attempt to relegitimatize himself.

MR. ABRAMS: Judge Owen, did you have any more question is this area?

THE COURT: Not at this time, thank you.

Q Directing your attention now

to the first column of page 364, which is the next to last page of the article, there is a paragraph which starts out saying,

> "Later when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former president a visit. If I made the trip it would remind everybody of Watergate and the pardon. If I didn't people would say I lacked compassion."

And then there is a description of President Nixon in the hospital by President Ford. [405] Do you consider that material newsworthy?

A Yes, I think so. I think that how President Ford perceived Mr. Nixon at that moment, how it affected his thoughts and perceptions about the former president, at the moment when Mr. Nixon seemed to be apparently genuinely quite sick, I think that is

very, very germane. I think that is news, particularly since it is quite dramatic.

Q What about the material that follows that with respect to Mr. Kissinger?

A Well, I think that is what I would call ancillary. I think that is news. I don't think it is powerful or forceful. I'm not a close friend of Mr. Navasky's and I wasn't with him when he did this, but I can't believe that if this were the best stuff in the book he probably would have used it, run with it. I don't think he would have published a piece in the Nation if this were the strongest stuff he had. Perhaps once he was doing it he threw this in as newsworthy. It's important

because Kissinger is important, the relationship of Mr. Kissinger to Ford is important, but I don't consider it by any means as powerful as the preceding stuff.

MR. ZISSU: I object to the speculation as to what Mr. Navasky would have believed or wouldn't have [406] believed as distinguished from his opinion.

THE COURT: I will treat it all as opinion.

MR. ZISSU: Thank you.

THE WITNESS: Fine.

Q Mr. Halberstam, what --

A I guess I was speaking for myself. I am speaking as if I were the editor of this.

Q And continuing speaking -- well, not as if you were the editor, but

speaking as a person with the background you have and the knowledge that you have, would you address the question of whether the material on John Connally is newsworthy material?

A Well, I think that's newsworthy. John Connally was like Ronald Reagan at that time, a man about to make a presidential race, and, therefore, what Mr. Ford knew, what Mr. Nixon thought of him, and what Mr. Nixon thought about Mr. Agnew, is news, and I mean there was no telling that a year later that might have seemed a good deal more important than some of the other things had Mr. Connally made a stronger run than it turned out he finally did.

Q What about the next section, entitled "On the decision to run again"?

A Well, I think it's you know, I think that anytime the President does or doesn't want to run, that's [407] important news. If Mr. Ford had only -- had wilfully, deliberately, made himself into a one-time appointive or half-term appointive president and did not run again is news, the fact he was so inclined is news, and the fact it is Mr. Kissinger who talked him out of it I think is very much news. It is interesting it was Mr. Kissinger who talked him out of it. [408]

Q Why is that?

A Well, I think Mr. Kissinger is a man with an enormous instinct for power, and I think that is a constant pattern of Mr. Kissinger's instinct for power, including now his most recent

attacks on the foreign policy of Mr. Haig, which I think is intriguing. Mr. Kissinger is a subject of great controversy in this country and anything that adds to his own role -- and one of the things unwritten here is if Mr. Ford runs and is re-elected Mr. Kissinger stays on as Secretary of State.

Q What about the material on David Kennerly, the White House photographer?

A Again, I would consider that sort of ancillary. I think it's news and I think it's intriguing. The Mayaguez is an important moment in that presidency. It's particularly for people for whom the Tonkin Gulf looms very large. Tonkin, which is very comparable to Mayaguez, triggered off a war

that lasted us ten years. Mayaguez, which was in many ways simpler -- I mean similar -- did not turn into a larger war, but it had important bearings on attitudes of decision making. Therefore anything that is a reflection of what men like that were thinking at the moment is news, and the idea that the youngest man in the room, a photographer, makes a suggestion which [409] apparently affects how the senior officials of the State make their decisions, that's not just titillating, that's news. That's important.

Q What about the next passage with respect to President Ford's view on President Nixon's charaacter?

A Well, I think if you were a reporter and you were assigned to

interview Mr. Ford one of the first questions you would ask him among others is, "What do you think of Richard Nixon," so it's news. I mean this is a man who is your predecessor, who has had a great deal to do with your career, his shadow hangs over your presidency, what do you think of him? So what one president thinks of another -- particularly given the complexion of the strains that have run through those two presidencies -- I think that is very important. Part of the question it's answering goes back to the pardon, what went wrong with the man? So it's news.

Q. Have you a judgment based upon your experience in journalism and as a critic of journalism as to whether the Nation article has too many quotations in it?

A. Well, I thought it was quite understated myself. I wear two hats on it because I am a writer, [410] and a writer of books, and I feel very vulnerable to somebody who would decide to take my material and lift it off. It seems to me Mr. Navasky did a quite honorable and responsible job of seeking for news and held down to an uncommon degree the direct quotations. I think to the degree he could be centered on news and be paraphrased. There is only one four, five or six line thing where he really directly quotes. I think it's on how Mr. Ford thinks Mr. Nixon looks, which is almost impossible to paraphrase. There you have to have almost the exact words. It seemed to me he was quite scrupulous in trying not to offend

the book but look for news. I think he did that very well.

Q. Mr. Halberstam, if you had obtained the manuscript of the Ford book and had decided to write a news story with respect to it, would it have affected your judgment as to whether to write the story if you had known that Time Magazine was going to publish excerpts from the book in the order of two weeks later?

A No, it wouldn't have.

Q Why is that?

A I consider it a state document. I mean I think it's an interesting thing here. We have a book [411] and the book should be respected. I would be on the other side in this trial if Mr. Navasky had quoted a thousand

pages -- excuse me, a thousand words of the book, and just run this, and taken Mr. Ford's book. But it's also news. As I say again it's a state document about those days as the highest public official when in fact Mr. Ford was paid for by public funds. I mean this is out in the public domain in the most basic and primal way, and, therefore, I have a profound sense it is in the public domain in terms of it being newsworthy. Not the texture of the book, which I consider to be very different. Excerpts are texture. But news -- and I draw a line, and I think you can draw that line -- news is different. I think Mr. Navasky did this with great integrity. I don't think he stole the book but I think he responded to what was news in the book.

MR. ABRAMS: I have no further questions of Mr. Halberstam, Judge Owen.

MR. ZISSU: I would also ask time for cross examination on this witness, your Honor.

THE COURT: Are you saying, in effect, that we have here a record in which President Ford spent a great number of hours being interviewed to get his words on tape, so that then Mr. Armbrister, who worked [412] with him on this could put them in dramatic form and order and edit accordingly and then give them back to him for the President's own editing, and of course you know the thousands of hours, I am sure, that go into the creation of a book. Right?

THE WITNESS: Yes.

THE COURT: Are you saying that even though these are events that are state events, the President is not to have copyright protection for the hours of work he has put into this to get it down in a form where it can be read? I get a little sense that having put this out that it should really become in the public domain by its mere publication.

THE WITNESS: I think it's in the public domain, your Honor, as news. I don't think it's in the public domain as texture. I think that -- and I think this is really a very considerable thing, and I do write books, and therefore it's something I think about a lot. When I did "The Best And The Brightest," for example, which I worked on for four years, and I did all my own leg work,

and I saw four or five hundred people, there were a number of news stories, major news stories in that. For example, the fact that the U.S. highest executive made the decision to send combat troops to Vietnam without [413] finely defined roles, missions and troop levels, and comparably the fact Mr. Johnson and Mr. McNamara in January of 1966 lied to their own council of economic advisors having told the -- having been told by Mr. McNamara and General Westmoreland that it would be a large war, that it would go from 200 to 400 to maybe 600,000 troops when the council of economic advisors came to them they said, no, it's a small war, and as such we got out of that the inflation which still troubles us. That

is a news story, and I would feel that the texture of my book, the portraits of Mr. McNamara, the portraits of President Johnson, the reportage, that texture is mine, but news stories which are important to the public domain are in the public domain and I cannot protect those, nor have the right to protect those. If the New York Times runs a story they had every right to do that, and every reason to do it.

THE COURT: How do you separate between what you call your reportage and the news story?

THE WITNESS: I think news story is news. It's something paramount. That is not -- a book is a very complicated thing.

THE COURT: You are not focusing on what I am talking about. [414]

THE WITNESS: Excuse me.

THE COURT: What I am talking about is if you quote your book verbatim on an item that you concede for these purposes is news, is that fair or is the person who is taking the news story required to paraphrase you or is he required to shorten up your language, or what?

A Well, I think there is some common sense rule in here. I don't know. I don't think it's a great problem. Say The New York Times had decided to run a story on this very important moment where they decided to send combat troops in but they really had not defined roles, missions, and troop levels. It's astonishing. In other words, was it 200,000, 300,000, or we will only go to 400,000? Whatever it

was, they had not defined it. I would think if the New York Times wrote a story based on that, that they would have the right to quote from up to three or 400 words directly from my manuscript, yes. It may be as they began to go above that they would be beginning to infringe upon my book. But again it's a gray area, and they would have been right to know that that was news.

If they had run 600 words of my portrait of Robert McNamara, with the anecdotes and the writing that was mine, then I would have really felt raped [415] and I would be angry, and that's what I mean by the difference between news and texture. One is in the public domain an one is mine.

THE COURT: Anything else?

MR. ABRAMS: No. Thank you.

THE COURT: Thank you very much. You are excused for now.

MR. ZISSU: Your Honor, will you inform Mr. Halberstam he may be called back.

* * *

[Direct Examination of Victor Navasky] [435]

Q Did a time come when you received a copy of the manuscript of a book entitled "A Time To Heal" by Gerald Ford?

A Yes.

Q Approximately when was that?

A Sometime, I guess, in March of 1979. [436]

Q Did you request the copy?

A No.

Q Did you pay for it?

A No.

Q Had you previous to receiving the copy made any attempt to purchase any rights related to the book "A Time To Heal"?

A No.

Q Had you attempted specifically to purchase first serialization rights to the book?

A No.

Q Does The Nation ever acquire first serialization rights?

A Yes, but again we don't and can't get into competitive bidding situations because of our financial situation. But we will -- first of all, publishers will submit manuscripts to us that they think are appropriate to the magazine, but on our rate of pay we pay

less, for example, for first serialization rights than we will for an original article, so that we would maybe offer a hundred for first serial rights for something that we thought would be of special interest to us. So we are not part of auctions and it's not part, an active part of the magazine. We prefer to publish original material. [437]

Q Did you understand at the time you were given a copy of the manuscript of "A Time To Heal" that the person who gave it to you was authorized to do so?

A No. I understood that the person was giving it to us in a kind of spirit of -- as that person put it, a whistle-blowing spirit.

Q But you understood the person was not authorized to give it to you, is that correct?

A That's correct.

Q What agreement, if any, did you reach with the person who gave it to you?

A The only agreement I reached with the person who gave it to me was that I would preserve that person's confidentiality.

Q What did you do after you received a copy of the manuscript?

A I took it home and read it.

Q Did you make any notes with respect to it?

A Yes. Now, I should say this happened a long time ago and we had processed -- I have processed over a thousand manuscripts since then. And it wasn't until the lawsuit that I really began to focus in and try to reconstruct

everything I did. And part of my [438] way of reconstructing it was to gather everything together in the office and look at it, and I remember taking notes, and I did that, yes.

Q Are the notes that you took the document which has been marked in this case as Plaintiffs' Exhibit 20, the original of which I hand you now?

A Yes, I think so.

Q Another document introduced in evidence yesterday was a document marked as Plaintiffs' Exhibit 18. Can you tell the Court what that document is?

A Well, this is an early draft of the article. It may be the only first draft, and I may have gone right from that to the final or it may be an intermediate draft. But it is a draft

that I wrote of the article that eventually appeared in The Nation.

Q Another document introduced in evidence yesterday was marked as Plaintiffs' Exhibit 19, which is entitled "Note on Structure." Could you tell us what that document is?

A Yes. This is a four-point outline to myself, and I sometimes will, when dealing with a large body of material, after looking at it quickly, write a preliminary outline for the article that I am going to write, and this is my preliminary outline to myself [439] about how to think about it.

Q Is this the only outline that you found when you looked through your files for any documents?

A Yes, it is.

Q Can you tell us what you did after you read the book?

A I took notes from it -- I guess I scanned it very quickly. I then read it more carefully, took notes from it, and then I attempted to write up a story that we could use in the magazine on it. It seemed to me that it was -- that what had been dropped in our lap was hot news and that I had an opportunity to get out a very important news story quickly; the kind of story what rarely comes to a magazine like The Nation. And what I really don't remember is whether this happened over a two-day period or a one-day period, but I spent maybe a half dozen hours or six to ten hours reading it and maybe another few hours, six to ten hours

writing it. I remember staying up very late and I did a draft of the article.

* * *

[440]

Q Why did you believe that the manuscript could be the basis of a news story?

A Well, I didn't and don't pretend to be a Watergate scholar, and because this happened over the weekend, I didn't have the benefit of a copy of the Hungate hearings in which to compare what happened here with what happened there. I may have consulted Tony Lukas' book "Nightmare," which I consider the authoritative book on the case and I have had discussions with him about it, and I had a copy handy. But I also considered myself a more serious and

informed observer of Watergate events than the average citizen or even the average reader of The New York Times. I had written a great deal about the criminal justice system, I had done articles for The New York Times Magazine about every attorney general since Robert Kennedy, so I felt confident that I had a general impression of what was generally known, and I was astonished by some of what I read in Ford's book. I was not aware at the time, I must say honestly, that the Haig transaction had taken place and that Ford had called Haig after and read him the statement that he read him, and I certainly hadn't known about his conversations with Jack Marsh or with Bryce Harlow, or with Bob Hartmann. But it was the Haig thing

that leapt out at me and so [441] it seemed to me that there was major news there, and that the news was not just they had this conversation and not just that here it was with Ford authenticating it, but that I frankly didn't accept it -- what I regarded as the veneer of innocence on that conversation that Ford had so successfully put on it.

I had questions about that. I didn't pretend to know any more than President Ford told me as reader in his memoir, but it seemed to me that that set of facts: conversations with Haig, five options being outlined, the fifth option being if you will agree to pardon Mr. Nixon perhaps he will agree to resign, and Ford asking him, "Is it possible to pardon an individual before

he's been indicted"; Haig having checked out in advance with a White House attorney that it was possible, Ford then not saying anything to anybody about it, and the next day when it came up in a conversation with an aide, one of them telling it was a time bomb, another one saying it could cause trouble, and a third saying something else, that it was a real mistake, that silence implies assent, and Ford then reading a pro forma statement, it seemed to me that those facts could either be evidence, as Ford said they were, of his totally appropriate behavior, or they could be evidence of something more sinister. [442]

That's where the policy relevance and newsworthiness leaped out at me. So I sat down to write a story about that.

When I did, I also went back to my notes, and there were a half dozen other things in the book that seemed to me newsworthy, so I put them in my story. And that is what I did.

Q What do you mean when you say policy relevance?

A Well, if I had wanted to write a news story off of the Ford book and if I, for example, had been employed at the time by The New York Times as a reporter and the book had come to me, whether before or after publication, and my assignment was to write what is news in this book, I would have written a different story, and I would have included, for example, the fact that Ford reports that Betty was jealous that he kissed some startlet. I would have included

the very moving material about her operation. I would have included some tidbits about his daughter Susan and her relationship with the White House photographer. I would have included some material on his decision to go public with and appear before the congressional committee, which was investigating the circumstances of the pardon. That was a major decision.

But again, it seemed to me of greater historical than immediate news significance. That was [443] a judgment I made. But if I had been writing just bing, bing, bing, not policy relevant, but a news story for a general interest publication, I would have included those materials in addition to the materials that I included, and I guess having been

instructed by Mr. Friendly, I would have included the Glomar Explorer and other things like that.

Q When you say that you included material that was policy oriented as opposed to the other kind of material you outlined for us, what kind of policy are you talking about, when you say policy oriented?

A Well, I would say policy relevant. Social policy and public policy is what I am talking about. Things that affect the state of the country and that have some importance beyond historical or reader curiosity.

Q Why did you believe that the material that you published on the pardon had importance beyond historical or reader curiosity?

A Well, there is a two-fold answer. First, at that point, since President Ford was a live possibility as a candidate for President or Vice President in that year, it seemed to me all news about him had what I would call policy relevance. But my particular reason for picking on the pardon news was that if the questions [444] that that manuscript put into my mind about a possible obstruction of justice were really -- you know, I may have been wrong, but I thought they were real questions -- if they were real questions, then they would have raised troubling -- they would have provided a troubling agenda for President Ford and Alexander Haig, who was another possible presidential candidate at that time, a

troubling agenda of questions for them at news conferences throughout that preconvention period. And it seemed to me that that was a real contribution that it had fallen into The Nation's hands to make.

Q Can you tell us in general how you decided what material to quote in your article, and what not?

A Well, in general, I guess first, I was conscious that this was a manuscript and that I wanted to quote that which was -- I considered newsworthy. But I also did not want to take Ford's literary contribution away from him, unless I considered that genuine news that the public had a right to know and that was important to the story. So that whenever I saw what I regarded as a

public document in that manuscript, for example, the memorandum from Ruth to Jaworski, or when Ford said I read this to Haig over the phone, I assumed it was [445] a document, turned out not to be, but I felt those things I could quote without any problem at all. Where there were what seemed to me news critical conversations that related to the possible, what I regarded as possible obstruction of justice, but related to the pardon, for example, the remarks of Harlow, Marsh, and of Hartmann, it seemed to me essential that I quote their conversations verbatim. And again, my belief was that they were nobody's property, they were just their conversations and that I had the right to quote them. Then there were times

where Ford was describing his own mental state and in those cases I did not generally feel free to quote but except in some cases I thought it essential.

For example, when he said he thought it was an act of cowardice for Rockefeller to withdraw from Vice Presidental contention, it seemed to me the word cowardice, it was very important that I make clear it was his word, so I put those in quotes. Then there were situations such as his visit to Nixon in Nixon's bedroom when he was suffering from his phlebitis, where he described Nixon as being on the brink of death, in his own words, and I found it there impossible to distinguish his description from his words. I couldn't paraphrase it in a way that I [446] was

comfortable with, and it seemed to me that the occasion of the only two living former presidents of the United States at that time confronting each other, where one of them was close to death, if ever there is news, that was it, so it was okay for me to put that paragraph in.

Then, in other cases, I'd have to look to tell you, well, I used this phrase and not that phrase. There is one other phrase I remember putting in that I felt odd about when putting it in, but then I will tell you why I left it in later, after we showed it to our lawyer, and that is where I quoted Ford as saying that he had learned at the Yale law school that public policy sometimes takes precedence over law, and I

knew that since having gone through that institution and since that wasn't my idea of what they taught me there, it was news that the former President of the United States might be misapplying a principle, of Myres MacDougal who taught that course, as a reason for pardoning Richard Nixon. So that was a personal decision. [447]

Q Let me put before you, Mr. Navasky, Plaintiffs' Exhibit 10, which is the article, and just ask you about a few of the other quotations which you have not mentioned. On one page toward the bottom of the page, the term "smoking gun" is quoted. Why is that?

A Well, that seemed to me almost a term of art in the Watergate discussions. Also, there is a kind of

negative reason for putting that in quotes, and that is that it has come to be almost a cliche, and I try to stay away from cliches in the process of writing the magazine. So it was just to kind of set it off, to indicate that it wasn't our phrase.

Q The next page before, it says, "Ford was deeply hurt by Haig's revelation," and then there is a sentence which starts, "Over the past several months, Nixon had repeatedly assured me he was not involved in Watergate." The quotation ends a little bit later. Why did you quote that?

A I am going to answer all your questions and everybody else's, but as I said earlier, I can give why I quoted this and why I quoted that. It seems to

me ultimately what happens when you write a story like this is, you are creating something that has its own integrity and you frequently put one sentence in to make another sentence [448] work. And I was not -- maybe I should step back now and tell you the other article I thought of writing off of the manuscript at the time. It certainly might explain why I put this in.

Q Why don't you go back to that.

A It seemed to me there were two possible pieces I could write off of this book in the short time frame I felt I had to do it. One was the story that appeared, which was essentially this news story with its implicit question about whether there was an impropriety. The second was a much more overt

editorializing story, where I made the charge that there was a possible obstruction of justice and called for, in a kind of classic old fashioned incendiary journalistic fashion, called for an investigation of this based on what I thought was the new evidence.

I didn't do that, the second, for two reasons. One was I wasn't sure which of what I saw in the manuscript was new evidence at that point. As it turned out, some of it was new and some of it was not new. And secondly, it seemed to me that if we were going to achieve our goal of not only reporting this event, but making news out of our report, which we very much wanted to do with our story so that we could raise the questions that I have described

before with the press, with our readers, with the public at large, if we were going to achieve that [449] goal, our best chance of having this material taken as fact was outside the context of a piece which made the argument directly in an editorializing way.

So I wrote as fairly as I could and as objectively as I could, I wrote a piece which, nevertheless, was organized to raise the questions I wanted to raise, rather than to put the construction on the same set of facts that Mr. Ford and Mr. Armbrister put on them that they wanted to do. So in that context it was important to me to have in those episodes that reflected the seriousness, from Ford's own perspective, with which he approached these issues. And so this

quotation "Over the last several months, Nixon had repeatedly assured me he was not involved in Watergate," seemed to me -- first this was news because it was evidence of a deception of one president by another president, and secondly, it begins to tell you something about what was going on in Ford's mind as to why he pardoned Nixon, which I think is part of the continuing national inquiry, because it relates to these critical issues of what are the criteria for pardon at that level in this unique historical event with its unique reverberations.

Q Let me go on to the next paragraph, Mr. Navasky, indeed, the next two paragraphs, the one which starts, [450] "He could ride it out or he could resign," and the second of which winds

up with a quotation from General Haig. Could you tell us, as best you recollect, how you decided what to quote and what not to, as you wrote that?

A Sure. I put in quotes the words "ride it out." I felt it's important for me to say, hey, this is not The Nation characterizing this. We want you, the reader, to know this is the way they characterized this. So that gives credibility to the narrative.

Where I put in "because of his references to the pardon authority I did ask Haig about the extent of a president's pardon power," and then the next paragraph begins, "'It is my understanding from a White House lawyer', Haig replied, 'that a President does have authority to grant a pardon before

criminal action has been taken against an individual'"; it seemed to me I found it difficult to find a credible explanation for that conversation that did not raise the possibility -- not the probability but the possibility that there was a deal being made there or cooked up there. And so I wanted to, it seemed to me it was therefore necessary to put that in their words, rather than in anybody else's words, because that was the nub [451] of the obstruction, the impropriety, whatever one wants to call it, if there was one. So that's why I put that in quotations.

THE COURT: Can I ask you why you put in quotes the prior sentence, "Because of references to the pardon authority, I did ask Haig about the

extent of a president's pardoning power"? That is not in quotes in the book or the typescript. And I noticed that earlier.

Why did you put that in quotations?

THE WITNESS: If he said it, unless you are saying I misquoted President Ford, this is a quotation from the book, because "I did ask Haig about the extent of a President's pardoning power" is Ford speaking as a narrator. So I had to put it in quotation marks to make clear that it was Ford as author saying it. And perhaps it could have been --

THE COURT: As distinguished from your paraphrasing?

THE WITNESS: As distinguished from my paraphrasing it. I'd have to go back to the book to look at it, but that is the only place -- since he doesn't give

the quote where he says, here's what I said to Haig, "Is there a" -- you know, that would have been the alternative [452] way of doing it.

THE COURT: You did the same thing when you say, "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate." This is not in quotes in the book either.

THE WITNESS: I am quoting the book.

THE COURT: The quote is not quite accurate, I observed. You changed one word. You didn't change the sense of it at all, but you transposed a word here.

Do you know why you used a quotation at that point?

THE WITNESS: Yes. It seemed to me, and I can also explain the unfortunate, there are a number of inaccuracies that

crept in here. But first, to answer the question of quotes, I was quoting Ford as narrator, and I could have said there, I guess, "Over the past several months Nixon had repeatedly assured Ford he was not involved in Watergate," but it seemed to me it was a much more powerful statement for the reader and authenticated the news value of it so that someone on an AP desk deciding whether or not this is real, doesn't have to say, can I trust the Nation to paraphrase properly, the Nation, which has a political perspective which may cause them to be suspicious of these fellows, can I trust them to [453] paraphrase properly.

So those few places where it seemed to me there should be no dispute about

it, I quoted directly his language from the book. He didn't have quotes in the book because the book is his, and when I am quoting from it, maybe I should each time have said, he said in "A Time to Heal", et cetera. If there are inaccuracies that you suggest, another one is that Jackson, Mississippi is transposed to Jackson, Michigan. The way that happened I have to assume is that because I was working eventually from my notes after I finished taking notes, I returned the manuscript and we didn't have anything to check the notes against anymore. Regrettably the error that you point out got in there, and there are one or two others I'm sure that have crept in.

THE COURT: The errors I think are

of little if any concern. My question isto the use of the quotation marks for those that were obviously not quotations.

THE WITNESS: They are quotations from author Ford. Ford as narrator.

THE COURT: Rather than something Ford said?

THE WITNESS: Rather than something he said, right. That is the purpose of those quotations. I hope the article doesn't mislead the reader into thinking that [454] they are what he said.

Q You have mentioned a few of these already and I won't ask you to go through them again, Mr. Navasky. The last paragraph on the left column on 363 about the

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consultations with Mr. St. Clair, Mr. Marsh, Mr. Harlow, contain quotations around the words "time bomb" and "could cause a lot of trouble" and in the preceding paragraph, "silence implies assent." Why did you quote those?

A If one looks at the conversation with Haig, the conversation with those three peopie and the telephone call to Haig as the three elements of a possible deal, then it would seem to me in each case very important within the limits of both the space of the magazine and what the law would permit, to have these people speak in their own words. Not here in President Ford's word, in their own words, about what was happening at the time it happened.

Q Is that the reason for most

quotations of people other than President Ford?

A Yes, it is. It might be the reason for all of them. I'd have to go and look at each one.

* * *

[455]

Q . . . On 363 under the quotation from the Ruth memorandum which you have already talked about, there is a paragraph which says that Ford decided that the court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else." Do you recall why you quoted that particular line?

A Well, I'd say, you know,

sitting here now, I'd say I could have paraphrased those lines, but again, it was a critical historical decision and it seemed to me, even though Ford didn't say it conversationally at the time, to that extent it was desirable to say this in his words, because of the absolute certainty with which he expressed himself. If there had been a vague general statement, I'd say, "Ford thought public attention would be difficult to pin down," that would be one thing. But he said "it would be virtually impossible for me to direct public attention on anything else," it seemed to me virtually impossible for me to communicate that in any way other than by quoting him directly, I guess. [456]

Q Then at the bottom of page 363

in the right column in the discussion of the desire on the part of the White House under President Ford for former President Nixon to make a full confession on the occasion of his pardon the last line reads,

> "But as Ford reports Miller's response, Nixon was not likely to yield. 'His few meetings with his client had shown him that the former president's ability to discuss Watergate objectively was almost nonexistent.'"

Why did you quote that?

A One of the themes that runs through that part of "A Time to Heal" that it seemed to me important to capture was this portrait of President Nixon as being out of touch with reality. While I had read that charge from people like Woodward and Bernstein and critics of President Nixon before, I had

never seen it from someone who obviously respected and was in sympathy with him. And again because of The Nation's reputation, which is deserved, as a progressive journal, it seemed to me important that we make as clear as possible that this comes from President Ford so that readers could accept it as his characterization and not the characterization of someone who might have a political disagreement with President Nixon or President Ford. This was his own way of saying [457] it. . . .

Q In the next paragraph, which starts "The statement they really wanted was never forthcoming," there is a statement attributed to Ron Zeigler and a part of a statement in response to it. Why did you put those in quotations?

A Well, I put in "'Let's get one thing straight immediately,'" Zeigler said. "'President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not.'" It seemed to me that was, first of all, a statement by a public official, an arrogant statement that I was not aware had previously surfaced before in that way, and it was newsworthy. But also it was, again, important to characterize this tension that was going on between these two camps in this vital historical moment. And when Ford writes about this as a narrator, it was the definitive quality of that statement that made me put it in. I left out a lot of other things Ford said that were interesting to our readers

that I would have liked to put in. If I were excerpting his book, I would have put in when he observed this was a condescending [458] use of his first name by this kind of pipsqueak former press secretary, or press secretary, Ron Zeigler. It was an inappropriate thing to say, and it obviously offended then Vice President Ford. There were a lot of details like that one I might have put in, but I put in what I thought was essential right there.

Q And then in the next paragraph of the discussion between Mr. Ford's aide, Benton Becker, and President Nixon, with respect to President Nixon's admitting that accepting a pardon was an admission of guilt, there are three sentences in the paragraph, the third of

which contained a few words quoted. Do you recall why you did that?

A To me, the passage was uniquely revealing about a very sad moment in history, that President Nixon's desire to talk about the Redskins rather than this decision which more than any other was going to affect his life and perhaps his reputation in history, it seems to me was news with historical resonance and I couldn't think of any way -- if I said out of his own jewelry box, what he ended up giving as a gift, this tie clasp, if I said he gave a gift out of his own jewelry box, that to me says a lot less than saying he gave a gift "out of my [459] own jewelry box." Nixon was saying, "This is what I have to give you. It's my last

set. There is no other like it. I am giving it to you out of my own jewelry box." That to me was a touch that was too good for me not to put in, and it was Nixon's touch, it was the way he spoke and I put it in.

Q You already referred to the next few paragraphs. What about the quotations that are included in the passage with respect to Mr. Kissinger?

* * *

A . . . First of all, these are all conversations that went on between Ford and Kissinger. Kissinger's answer when he said, "I know we'll get along"; Kissinger said, "It's my job to get along with you, not for you to get along with me." That to me is a kind of an affirming piece of evidence as to the

authenticity of this whole description, because you see Kissinger is a quintessential diplomat there and you also get a sense of him lobbying on his own behalf to play a role in the next administration, i.e., in the Ford administration, and it tells as much about how power works at [460] that level as anything of that sort could do. So it seemed to me worth including.

And I might say, as a category, the half dozen addendums that I included to the story about the pardon I wouldn't, if I had been given these half dozen addendums without the pardon story for The Nation, we probably wouldn't have run them. We have a thing that we call it "Item. Item. Item." where we do short takes and we might have run one or

two of them in the item section, but as part of this news story about this particular book coming out with that particular message, it seemed to me that they really add to the whole impact of this story. And also, whether or not I chose to run it, I would have thought I could have run them because they are all newsworthy items.

* * *

THE COURT: Do I understand that if you had not had the pardon story you wouldn't have run any of the balance, is that what you are telling me?

THE WITNESS: Might not, Judge. I have to look at it that way. But I thought there was news in the balance, but it wasn't that important that, so important as to displace other things we might want to do in the [461] magazine.

THE COURT: Go ahead.

Q The quotation of a few sentences from Secretary Kissinger on the right side of the page on page 364 with respect to the decision to run again, in which Secretary Kissinger talks President Ford out of saying that he wouldn't run for reelection, why is that material quoted?

A Well, it seemed to me newsworthy. It had not been said before. But the insight that Kissinger had into the nature of a lame duck presidency was instructive, and so it was newsworthy with a piece of information about how our whole system works. And again it shows Kissinger with this really Machiavellian intelligence, not in the invidious sense of that word, but in the

sense that is used in The Prince that he really is advising somebody on how to use power at the most sophisticated level.

Q The next section, Mr. Navasky, has been commented on, as you have heard in court, by a few people. Tell me, first, why you included anything about what Mr. Kennerly did and about the Mayaguez incident.

A Well, you know another definition of news which came up earlier is man bites dog, and it seemed to me this incident met that definition. That usually a photographer is the fly on the wall and he may be able [462] to eavesdrop on these great decisions of State, but in this case the fly on the wall helped make policy and had an

insight that none of the great policymakers had. So I wouldn't agree with some of the earlier people who said I didn't intend to suggest that that's the way policy was made during this administration as a matter of course, yet the fact it can be made that way is a marvelous piece of news to the American people, to know that you and I could have an impact if only we had access. And I also think that Kennerly was less insulated than the other characters in that drama just because they only tend to be able to go to occasions of State whereas he had access to both the corridors of power. . . .

* * *

[463]

Q You may have dealt with this already in passing but I will ask you: The material with respect to President Nixon's character by President Ford. First, why did you include any quotations there?

A Well, again, you are dealing with this delicate issue of reputation and character, and I couldn't see a way of being faithful to that material without quoting this one historical character, this one president about another president. In addition, what was news to me was that Ford, who was portrayed in the press as a bumbling, affable fellow, had insight into President Nixon, and insight into his pride and his attitude towards weakness in others

contributing to his vision of his perception of right and wrong. It seemed to me really important to get out there and to isolate, and useful to do that. And as the final quote, which was the encapsulating quote of that theme in this piece, Nixon was out of touch with reality. [464]

Q Who did you talk to in the Nation before publishing the article?

A As I remember, I talked to three people at the magazine itself. I talked to Elizabeth Pochoda -- I talked to more than that. I talked to Elizabeth Pochoda, who was our literary editor, I talked to Richard Lingeman, who is our executive editor, and who edited the story that I wrote. I talked to our publisher and told him that we have this

hot news story, and I talked to Karen Wilcox, who was my assistant, and asked her to call Harper & Row to find out what serialization plans, publishing plans, there were, what the print order would be, when the book was coming out, all the normal things one would want to put into a news story about an event like the presidential memoirs.

Q Why would you want to put those matters into the news story?

A It goes back to the two different new stories one could write. If I were writing a story charging overtly an obstruction of justice, mobilizing the information in the document, comparing it with other accounts of Watergate, the Watergate pardon situation, and editorializing on

it, then the book itself there might have been a footnote that Mr. Ford admits this [465] in his forthcoming book. I wouldn't have put in these other stories and I wouldn't have put in anything about publication of the book. But in this case this was it seemed to me, a classic kind of news story about a major publishing -- what might have been a major publishing event, that here was a book coming out by a former President who was a candidate to be President again, or perhaps Vice President, and it's important to know how many copies there were going to be made available, it's important to know -- the more they had planned the better the peg for the story is. That's just a convention of

journalism. So that's why I wanted to find out that and why I put it in.

Q What information did you know at the time you first got the manuscript and began to work on it about first serialization rights?

A I had no information.

Q What information did you know at the time the article was sent to be published about first serialization rights?

A At the time our article was --

Q At the time the article came out.

A Everything we knew I put in the lead paragraph. [466]

Q Did the fact that Time had first serialization rights to the Ford

memoirs affect your judgment about whether to publish the article?

A It didn't negatively affect it at all, and I didn't know what they intended to publish. That Time and Reader's Digest intended to publish something, they could have taken another section as well. The fact that they both apparently intended to use the pardon and Haig's story confirmed later on my judgment it was news.

Q My question was what you knew then?

A I didn't know anything about it other than there would be serialization. I didn't know what it would be. To this day I must say I don't know what Time would have been. I know the representations that were made. I read

the Reader's Digest and they began with the same thing we began with.

Q You said you wanted to act quickly after you received the manuscript. Why was that?

A Because I thought it was hot news. I mean, first of all, this was not one of those investigative stories that we set out after and spent eight months on. It was something that was dropped into our collective lap, as it were, and in all humility I said if it happened [467] to us I felt it might be happening to a lot of other people, and that's part of the news business, you know. I go home by way of these New York Times trucks and I frequently see the New York Post truck racing with the Times truck to get to the news stand. The Post's whole

business against the Daily News is to get on the stands an hour beforehand. And so there is that part of the news business.

Secondly, and more importantly I guess I would say, it seemed to me that the only way we could raise the questions that I thought were important, which were the questions of whether there was the impropriety that that I had described and that I think is reflected in the conversations that are held here, was to take those facts out of the context that President Ford and Mr. Armbrister put them in, which was a context of not only innocence but probity and correctness, and let those facts speak for themselves, which I regarded as less than correct. I regarded those facts as raising troubling questions.

And if we had done that after the book came out we would have raised those questions for that sub-set of our readers who read book reviews or book comment, but we wouldn't have been able to have the chance [468] at making the news that would raise these questions in advance of publication so that the book might be read through the screen of the questions that we asked.

And so it then was important for us to do it sooner rather than later, and my training was if you have the news you go with it as fast as you can. We have lost stories because we have been too slow on them and they will appear on the front page of the New York Times, and that is always a lesson to us when that happens.

Q I apparently skipped one paragraph, Mr. Navasky, in the article I meant to ask you about. The material on John Connally on the right column at page 364 contains a few quotations. Can you tell us --

A Again, that's a combination of insight into what plans Nixon had, Ford is having, it's a sign of Ford's own limited ambition in this area, that he had first agreed to Connally, and Connally himself was a presidential candidate at this time. I don't remember now whether he had literally announced yet or not, but he was very much in the running and thought by many to be a favorite, and it seemed to me appropriate to put in there an item about him.

Q But did you consult counsel at any point [469] prior to the publication of the Nation article?

A Yes. Yes, I did.

Q When was that in the context of what you have described to us?

A Again, it happened long enough ago that I can't remember precisely, but I remember at least one conversation and probably had more than that, probably I had two or three, because we talk all the time about a whole set of different things, but I called him specifically about this manuscript.

Q Who is your counsel?

A Actually, I remember two conversations.

Q I should have asked earlier. Who is the lawyer you spoke to?

A The Nation's counsel. Landy Strongin. He is a partner with the firm Dornbush, Mensch & Mandelstam.

Q Why don't you proceed to describe your conversations with him?

A As best as I can remember them, when I told him that this manuscript had come to us he raised a whole set of questions about how we got it, and he wanted to make sure that it hadn't been stolen. I assured him that we hadn't stolen it, and the person who [470] gave it to us told me he hadn't or she hadn't stolen it, that the person who gave it to us was someone known to me and whom I respected and that we had authenticated that it was a real document and not a forgery. And he asked then to see galleys, and so when the manuscript that I wrote went into galleys he reviewed the galleys and then we had a conversation about the galleys

the result of which was that he gave me in effect what I interpreted as a legal green light to publish.

THE COURT: Did you discuss with him any copyright questions?

THE WITNESS: Yes, we did discuss copyright. I can't give you precise details, but basically what he said was that this was -- this is -- well, here's what he said first. He said two things. He described to me the fair use doctrine, and he said that this could be a close case, but in his judgment we would, if it went to court, we would prevail. But, he said, you are a poverty-stricken magazine, and you may not want to risk being taken to court because it could bankrupt your magazine. However, all things considered, I think you would be safe to publish it.

* * *

[472]

CROSS-EXAMINATION

BY MR. ZISSU:

Q Mr. Navasky, how many manuscripts have you, to use your term, processed since March of 1979 when you were given, without permission, the Ford manuscript in a whistle-blowing spirit?

A Let's see. I would say we get about -- I'm not now going to count what's known as the slush pile where I will see maybe fifteen manuscripts a day that we turn down. I will say that I read them and sometimes make comments on them and pass them on to a colleague, so if one included those it would be in the -- maybe close to 10,000. But if we don't include those and we just say

every week we have about five articles in the front of the book, maybe four or five editorials, I also occasionally read back-of-the-book articles that are in manuscript form, usually I read them in galley form, so 10 times 47 would be 470 a year, you can figure out.

Q How many of those are for books?

A Well, The Nation has an autonomous, relatively autonomous back-of-the-book section, so I don't routinely read book reviews until they are in galley.

Q No, not book reviews. How many book [473] manuscripts have you gotten?

A I would say we get maybe a couple a week.

Q And how many of those have you received since you have been editor of The Nation where you knew you were receiving them without the permission of either the author or the publisher?

A Two.

Q So this is a rare event?

A Yes.

Q If you had known about the Hungate testimony of President Ford would, as you term it, the Haig thing, have leaped out at you?

A Well, I knew about the Hungate testimony. I didn't have a copy of it available to check, but it would have because -- I think it would have. You know, it's a hypothetical question. But I think it would have because it had not penetrated, I think, the American psyche

at the time because that was a different context, and at different times we have different preoccupations. And my reason for thinking that partly is that the Reader's Digest did exactly the same thing we did, they made that their lead, and partly that having published the story, it was picked up by newspapers. [474]

Q I asked you, if you had been aware at the time would it have leaped out at you in the same way? I didn't ask you about any subsequent event.

A It's a hypothetical. I can't know any better than I tried to tell you.

Q How many words in your article are quoted from the Ford manuscript, do you know how many there are?

A Well, I distinguish the words

that his Honor was asking me about that are Ford's own words, and conversations and documents. So if you eliminate the conversations and documents, I would say very few.

Q How about with the conversations and documents?

A The conversations and documents, I can't give you a precise count, but I would say it was in the under 500 area.

Q Not over 600?

A I don't want to be held to this, because I have not personally done that count. Because my own assumption -- anyway, I haven't personally done that count.

Q Do you know how many are closely paraphrased?

A In writing about a book --

Q Do you know how many are closely paraphrased? [475]

A I'm not sure I know what you mean by closely paraphrased.

Q If I am not incorrect, the brief that has been filed in your behalf in this court uses the word closely paraphrased.

A Yes.

Q Closely paraphrased is closer to quoting than far paraphrase. You are an editor. I want to know if you know how many are closely paraphrased. If you don't know, you don't know.

A I can't answer that question the way you have asked it, no.

Q When you telephoned Harper and Row to find out when the book is going

to be published and when the serialization is going to be run, did you tell them The Nation already had access to the Ford manuscript?

MR. ABRAMS: I object to the form of the question, your Honor. The witness has not testified that he personally telephoned.

THE COURT: All right. I will sustain that. Rephrase it.

Q Do you know whether, I think it was Miss Wilcox told Harper and Row that?

A As far as I know, she did not tell them [476] that. It is practice --

Q I really --

THE COURT: That is the answer. Go ahead.

Q At the time that you published

The Nation article did it not occur to you that Time Magazine might find interesting the same portions of the Ford manuscript that you yourself found interesting?

A That they would think it was as newsworthy as we thought it was?

Q No. I mean --

THE COURT: As interesting.

Q If you put it in your own words.

A Yes.

Q At the time that your article -- when I say your article, I mean the April 7, 1979 article in The Nation -- was published were you aware of the details of the Hungate testimony given by President Ford?

A I am not a student of the

Hungate testimony in the sense that Mr. Reeves is, but I was generally aware of the Hungate testimony, yes. But not of the details sentence by sentence, and I did not -- I was not specifically aware of the Haig conversation -- telephone call sequence.

Q At page 39 of your trial memorandum submitted [477] on behalf of the defendants, it states that The Nation merely published -- on the bottom of the page -- merely published news that had come into its possession in a fashion indistinguishable from that of most news that arrives unsolicited at a magazine or a newspaper. Is it your testimony that the manner in which you received this manuscript is in fact the way that most news arrives unsolicited at the magazine or newspaper?

A We didn't publish the manuscript. We published the news --

Q I --

A We published an article about the news --

Q That is not the question.

THE COURT: That is not what he is asking you.

A As a question that -- could you ask it again? I'm sorry.

Q Yes. Is it your testimony that the manner in which the Ford manuscript arrived, or as you put it, was dropped into your lap, came to you in a fashion indistinguishable from that of most news which arrives unsolicited at a magazine or newspaper?

A No. [478]

Q Mr. Navasky, Mr. Friendly

testified yesterday that there were certain things he would do with respect to an unpublished manuscript, such as President Ford's, before publishing a story such as your own article. One of these was to check on the source to make sure that the document was what it purported to be. The other he said I might simply rely on a trusted source such as this. I believe you testified earlier that when you spoke with your lawyer, you told your lawyer that you had received the manuscript from a trusted source, is that correct?

A I also said that we had validated it, yes.

Q How did you validate it?

A I validated it through questions that I asked our source and the

source's answers validated for me that it was authentic.

Q What were the questions?

A I asked how he obtained it, and I asked questions about the history of dealings related to it that satisfied me that it was authentic. I don't want to breach my promise of confidentiality, which is why I am hesitating to go into further detail.

Q Do you believe that answering those questions [479] would reveal the identity of the source? Is that the problem?

A The problem is to go into detail about it might do that. But I'm sure there is a way, a language that we can figure out where I can answer your questions satisfactorily to you.

Q You want to try?

A Yes.

Q Since you know more about it than I do.

A Yes. Well, there are a number of ways that I validated it. First of all, I read it. And secondly, I asked the source how it was obtained; and thirdly, based on my judgment about the source's reliability, the statement of the source as to how it was obtained, my reading of it, I accepted the fact that it was bonafide.

Q With respect to the reliability of the source, without revealing the identity of the source, was it somebody you knew?

A Yes.

Q A long time or --

A Yes.

Q Mr. Navasky, is it fair to say that the purpose of your inclusion in your article of the block quote describing Mr. Nixon's appearance in a hospital [480] was done for the purpose of providing a positive aspect of Mr. Ford and to give balance to your article?

A That is not the only purpose at all of including it. The main purpose was that it was a dramatic statement, the information in which seemed to me indistinguishable from the language. And it seemed to me highly newsworthy that one President of the United States thought the only other living former president was perhaps, looked to be on his death bed.

Q But was it included, as Mr. Friendly, Professor Friendly interpreted yesterday, to give balance to the article?

A As I stated earlier, I -- and I will do with you what I did with Mr. Abrams, I'll be happy to go over each statement. The whole article, when you write something like this, without pretending that it's any great work of art, it does have integrity of its own and an organic life of its own. And one includes and excludes for both literary balance and for credibility, and so to me this statement, while that was not my motive in putting it in, this statement is a tribute to President Ford, but that wasn't my motive for putting it in.

Q Wasn't this part of your theme

or your purpose in isolating certain events, to remove, as you [481] termed it, the veneer of innocence of events relating to the pardon? Wasn't that your motivation?

A My motivation was to let the facts speak for themselves. As I saw them, the facts raised questions about the propriety of the conversations that Jerry -- Vice President Ford had with Alexander Haig and the possibility that there was some kind of deal made. And --

Q Was this part of that effort, to just get to these facts that would remove what you call the veneer?

A The statement about President Nixon by President Ford?

Q Yes.

A No. This was, as I thought I testified to, in addition to the main thrust of the article, which was on the pardon, I also testified -- I also included materials that had independent news value, and that seemed to me appropriate to go into an article about a book that was going to be published. In this case, however, that particular episode, it seems to me, qualifies under both headings, because while President Ford wrote that the reason he pardoned Richard Nixon was not out of a sense of compassion, this particular passage showed that he was a man capable of great compassion, perhaps more [482] than he understood. I didn't make that big a deal of it, but I put it in. It seemed to me a very powerful passage.

Q In your article you state that the Ford manuscript contains significant new detail. What is, if you can do it briefly, the new detail?

A Well, some of it I included here and some of it I don't include here. But, for example, the quotations from all of the aides that Ford spoke with after he spoke to General Haig and before he called him back, are new. The quotation "silence implied assent," the Jack Marsh "time bomb" quotation, and Harlow's "could cause a lot of trouble." I have just quoted tiny fragments of the much more extended treatment that President Ford and Mr. Armbrister give in the book. So you are asking me about the book, not my article, what the significant detail is, I take it. There also

is great new detail included about a lot of subjective material that Ford puts in that I did not use, about what went through his mind in deciding whether or not to appear before the Congress, and there is a lot of detail there about whether it's appropriate for a chief executive -- it was a historic event for a sitting president to actually present himself to the Congress -- and he explains actually why he did [483] that. I didn't use that here, but that is significant new detail in the book.

Q When I ask you the new detail, I mean the new detail that is revealed in the Ford manuscript about which you wrote in your article. You remember when I asked you the questions --

A I see. Now, let's get --

Q If you can be brief, please, and paraphrase.

A Yes. You are quoting from one part of my article that where it says significant detail.

Q Yes.

A Could you tell me where that appears?

Q I think it appears on the first page. It says in the last full paragraph --

A Okay. I say "Ford's account contains significant new detail on negotiations and considerations that surrounded it." I do not purport to give, in my manuscript, all of the significant new detail. That is why I was giving you more than you can find here. But as I say, here it seems to me it is highly

significant that Marsh, Harlow, and Hartmann had those conversations with Ford prior to calling Haig. Because it raises in my mind a question of whether he would have called Haig had he not had those conversations, and it raises in [484] my mind the question of whether the statement that he read to General Haig was a code word statement or meant exactly what it said. And those questions would not be raised from a mere reading of the Hungate testimony, and I think some readers of the Ford memoir --

Q Okay. I want to read to you some portions from your deposition that was given earlier in the case. Starting with page 86 --

A Should I just say one more thing?

Q No, I'd rather have you not.

A Okay.

Q At page 86, line 19, were you asked these questions and did you give these answers:

"Q Look at Defendants' Exhibit 6. There is a statement"

-- I'm sorry -- yes --

"there is a statement on the first page that Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surround it. What was the new detail?
"A Well, I cited last time, I believe the memorandum which I would have to get the article in front of me, which is the thing that struck me" -- this is continuing on 87 "as the most spectacular new detail. It is on page 363. It is Henry Ruth's memorandum. [485] That is number one. Number two would be the statement that Ford read over the phone to General Haig. Number three would be the fact that he hadn't told Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had that original discussion. Those three events struck me in reading the manuscript as things which were new in terms of the news

consciousness of the average reader. Later on we discovered that various things that were in the manuscript that we saw and some of it which we included in the article, maybe not those particular ones, but some of the things we included were in congressional testimony, but they had never been covered as news stories at the time so the public wasn't aware of them. For our purposes, it was the equivalent of new news."

Are you changing that testimony somewhat today?

A I don't mean to. As I said earlier, and as I say there, I learned later that some of the things that I thought were published for the first time had appeared in the Hungate hearings. But they were not part of the general consciousness, they had not been put in the configuration that I could now put them in as a result of reading them in concert with the other [486] material that I used. And as I also

said in my deposition, that I felt my article spoke for itself, and you can tell from its organization what I thought was most newsworthy and what not, because I used what I call a classic inverted pyramid style in writing it. And so you could --

Q Didn't you characterize as the most spectacular new deal, the Ruth memorandum?

A Again, I subsequently discovered that that appeared in the Jaworski book. I wasn't aware of that at the time. But I don't -- I thought it was important.

Q Isn't it a fact that none of these three things that I just read to you were new at the time?

A In context, they were new

because they were isolated by virtue of the conversations with his aides, it seems to me. They were new in the perception that there may have been a deal made, that's all.

Q Mr. Navasky, isn't it a fact that if you had been aware that the Ruth memorandum had been published in 1976 in Mr. Jaworski's book, and that the Ford-Haig August 1, 1974 meeting and the August 2, 1974 telephone conversation between then Vice President Ford and General Haig, isn't it true that if you had known these were disclosed years earlier in Mr. Ford's Hungate testimony [487] before a subcommittee of the House Judiciary Committee, you would not have written this article as the story you wrote it? Isn't that true?

A What is true is that if I had had more time to write this story I might have written it in a different way. But I still think it would have been a policy relevant news story, I would have written it about the Nixon pardon, and the only difference might have been, or a difference might have been, a significant difference might have been that I would have flagged that which was new and that which wasn't. But in the new configuration that I was able to put it, I would have included the same material in the same way. The new material that Ford provides, we now know, his conversations with Hartmann, Harlow and Marsh, it seemed to me highlight the importance of other material which was buried in the Hungate hearings

and in Jaworski's own book. And in fact, -- [488]

THE COURT: No, hang on. Starting with your deposition, you are asked, I take it, why in writing the story you say that the account of the Nixon pardon contains significant new detail which obviously made it newsworthy, right?

THE WITNESS: That's right.

THE COURT: And your deposition, at page 86 and 87, you are asked what was the new detail. You recite that the new detail is one, the Ruth memorandum; two, the statement Ford read over the phone to Haig; and three, the fact he hadn't told Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had the original discussion.

Those are the three new details that you said when questioned on April 3, 1981 were those that you regarded as newsworthy. What Mr. Zissu is saying to you, and I gather you acknowledge that each of those new details was in fact revealed somewhere: The Ruth memorandum in the Jaworski book; the statement to Haig in the Hungate hearings; and the conversation with Haig earlier, also in the Hungate hearings. So we are at the point where in fact none of these revelations are in fact new because they have all been revealed somewhere. They were new, perhaps, [489] to you, but they were not new in the journalistic view, right?

THE WITNESS: That is true, your Honor.

MR. ABRAMS: Your Honor --

THE COURT: That being true, then the question is: If you had -- this is where counsel is trying to get to -- if you had known that these were not new, would you have put this article in the way you put it in anyway?

THE WITNESS: Yes.

THE COURT: And you tell me you would have done it because of the fact that Mr. Ford conferred with three aides before he read the message to General Haig over the telephone, is that what you are saying to me?

THE WITNESS: I'm saying --

THE COURT: That that would have justified the inclusion of the article?

THE WITNESS: I say two things to you, your Honor. First, what they said

to him framed that conversation in a way that it had not previously been framed.

THE COURT: I understand that. But is that new detail making the conversation newsworthy?

THE WITNESS: Well, I would argue that it is, but I would argue something beyond that.

THE COURT: All right. [490]

THE WITNESS: My own experience, my news judgment may be wrong, but my own experience, it's analogous to a story Mr. Halberstam told this morning. I wrote a book called Kennedy Justice. In the book called Kennedy Justice I for the first time named the man that the Justice Department, that the Federal Bureau of Investigation gave as the reason for tapping Martin Luther King's

telephone. When my book came out it had -- maybe 25,000 copies were circulated, got a lot of attention. Nobody wrote a news story about the name of that man. Five years later, the Church Committee did a report about the wiretapping of Martin Luther King's telephone, and where that man's name was supposed to appear, they left it blank, they said for security reasons, we can't reveal the name of this man. I got a call from a reporter on the Washington Post who said, hey, didn't you reveal the name of that man in Kennedy Justice or however long ago this book was published? I said I did. He went to the library, got a copy out. The next day there was a story on the front page of the Washington Post giving the name of that

man, in a new context, saying it can be known, even though the Church Committee said [491] it was classified.

That was a new context that made a document that had appeared earlier in a thing that was a Literary Guild selection, that had wide circulation, that was reported in news media, not in headline news, but appeared here and there, there had been an article by Alan Dershowitz in Commentary Magazine about it, and other people. In other words, even though it had wide circulation, it became front page news five years later. What I am saying is these same documents in that context, in my judgment, and I might have been wrong, but in my judgment, because I was mistaken, you could argue, but I would argue even though if

you -- if I wrote it again now, I might say it a little differently, but I would write essentially the same story, that it is newsworthy for that reason.

Q Let me ask you whether you were asked this question and gave this answer in your deposition. The question is at page 55, starting at line 10:

> "Q So that even if all these documents had been made available or were available to you, you would have still felt justified in writing this story as you did the article?"

There is some colloquy. Then on the next [492] page, 56, is the answer, starting at line 5 going through line 11:

> "A If all the documents had been made available to the public and to all researchers at the time that they were made available to President Ford for publication, I would have written a different story. The story we would have written would have been from the documents. The only way the documents came to our knowledge was through

President Ford's report on them. So we wrote about his report on them."

Did you give that testimony?

A Yes.

Q Mr. Friendly mentioned yesterday that he would check the known record of matters to see what was newsworthy, if presented with a manuscript in the manner that President Ford's manuscript was presented to you. What sources did you consult in coming to your conclusion about what was significant new detail?

A In the circumstances in which I had it, which was basically over a weekend when the sources I would have liked to consult were not available, I consulted the manuscript and reported on the manuscript. I accepted Ford's statements as bona fide, and the way the book was presented in the book -- [493]

Q Other than the manuscript, I just want to ask you what other sources than the manuscript.

A The only other source that I consulted, and as I say, it's long enough ago that I don't want to say for sure that I did, but I probably did, was Anthony Lukas' book, "Nightmare", which in my reading was the definitive book on Watergate up to that time.

Q Isn't it a fact, as you just testified, that you consulted no sources other than the Lukas book, because you reached these conclusions on what was new on the basis of your own general reading and knowledge and also on the basis of your view that if you, who followd this closely, considered something new, then most of your readers would not

be aware of them either? Isn't that true? Isn't that the basis for your conclusion of what was new?

A The basis for my conclusion is that it was, in the context of 1979 with Ford running for President, news of great importance that there had been a possible obstruction of justice in connection with the pardon. And the configuration of not only those documents, but the conversations that I do report in the magazine in conjunction with those documents where one person calls it a "time bomb," another says "silence implies assent," and another says that it "could cause a lot of trouble," that [494] that conjunction made it extremely newsworthy.

Q At page 52 of your deposition,

I want to ask you whether you were asked this question and gave this answer, question starting at line 15:

"Q Did you consult any individual with respect to the facts and events discussed in the article?
"A It is long enough ago that I may be jumbling events in my mind. I remember calling to get copies of the testimony that Ford gave and asking for a copy of the testimony. I can't remember now whether I did that -- I don't remember it in preparing this article, but it is possible that I did. I do remember doing it. I think I did it in connection with the editorial that we were doing and after Harper & Row called Mitgang and he called us and started asking us questions and telling us that they were threatening us with a lawsuit. At that point I know that we wanted to get copies of the testimony that Ford gave to see exactly what was and what wasn't new in it. But I knew from my own general reading and knowledge and belief that what we had sounded like hot news and was worth publishing because if I, who followed these things rather closely, wasn't aware of it, it seemed that most of our readers would not be either and it was [495] important, and most general readers would not be aware of it."

Is that your testimony?

A Yes.

Q Isn't it a fact that you consider your readers to be people of influence and intelligence?

A Yes.

Q Wasn't one of your alleged reasons for copying as you did, that a normal book buyer would not be able to see the impropriety issue from Ford's account unless your article came out with it first?

MR. ABRAMS: I object to the form of the question. Using the word "copied" as you did, asks for the ultimate conclusion in the case.

MR. ZISSU: I am not asking for a legal conclusion. There is no doubt that was copying in the case. I will change the word "copying."

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No. 83-1632 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

VS.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
(Volume II — Pages JA-359-JA-715)

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(Question read.)

THE COURT: Treat that question as asked, to "writing" that article as you did, Mr. Navasky.

A I might put it differently, but yes.

Q Even though the context of the Ruth memorandum was not new detail in an absolute sense, and a statement read over the telephone to General Haig was not new detail [496] in an absolute sense, you considered these to be new anyway because these struck you as new in terms of the consciousness of the average reader, is that right?

A No. I considered them to be news, in the configuration of both the events that I described in The Nation article and in the context of the

politics and political atmosphere of 1979.

Q I think I just read to you a portion of page 87, starting at page 86. On lines 11 through 13 it says,

> "Those three events struck me in reading the manuscript as things which were new in terms of the consciousness of the average reader."

A The news consciousness.

Q Yes, news consciousness of the average reader.

A Yes. I considered them news.

Q Didn't you also consider these as new detail because of your view, and I am quoting you now, that they had never been carried as news stories at the time so that the public was not aware of them?

A It is my testimony now and what I meant to say then, and I think

what I said then was, the public was not aware of those documents, and I was not aware of those documents and the serious student of Watergate, who is not a specialist, may not have been aware of those [497] documents in the way in which one was aware of Mr. Kissinger praying with Mr. Nixon as publicized by Woodward and Bernstein, in the way in which one was aware of the fact of the pardon itself, in the way in which one was aware of President Nixon's last words to his staff after he resigned -- those documents had not penetrated the public's consciousness.

I would not have been interested in publishing them, however -- even though I believe they are newsworthy and I believe that we had the right to publish

them -- I would not have been interested in publishing them if they did not speak to me in conjunction with the other elements of this article and say that there was a possible obstruction of justice at the highest levels of government. And it's the whole thing together that constitutes news, and you can quote a page, or two pages of my deposition and leave out seven others, and embarrass me here, but that is what I really meant to say there. And I think if you read the thing all the way through, that is what it says.

Q But did you state,

"But they had never been covered as news stories at the time so that the public wasn't aware of them"

from page 87 of your deposition, lines 18 and 19?

A I'm sure I said that, but I said it in conjunction with the other statement that you read me that they hadn't [498] penetrated the news consciousness, and by that I mean, you know, there may have been a little news story here and there, but they hadn't penetrated the news consciousness as the thing that speaks best for what I meant to say.

Q So it is your testimony that they had never been covered as major news stories before the publication of your April 7, 1977 article?

A I wasn't aware of it.

Q You weren't aware of it?

A That's right.

MR. ZISSU: I am going to mark some exhibits for identification.

Q First, I want to hand you some things. First, I want to hand you a microfilm copy of a newspaper article.

THE COURT: Is there a tag on it?

MR. ZISSU: Not yet. This is for cross. Plaintiffs' Exhibit -- let me get a tag.

(Pause.)

(Plaintiffs' Exhibit 49 was marked for identification.)

MR. ZISSU: They are microfilm copies of portions of The New York Times dated Friday, October 16, 1974.

Q Do you recognize that, Mr. Navasky? [499]

A Well, I recognize what it is.

Q Do you read The New York Times?

A Yes, I do.

Q Do you remember reading this article and this material?

A Generally. Not specifically.

Q Do you recall that President Ford on the day before testified before the Hungate Committee?

A Generally.

Q Do you know whether he went on national television when he did so?

A Yes.

Q What would you call the type of headline that is carried by The New York Times? Is that a banner headline?

A Yes, I would call it, though, the reverse of the story that I wrote. The headline says there is no deal and I wrote a story --

Q Mr. Navasky, we are identifying a document. I don't want a

speech or an argument. If you have to have one, your counsel can redirect.

A Right.

Q I don't want to argue with you, I'm sorry. Is it still your testimony that the Hungate Committee -- let me ask you another question. [500] If you look through those materials, is there a New York Times editorial there of the same day?

A I am still on the front page, and I haven't gotten to the part that you are suggesting penetrated the news consciousness. [501]

Q I am not going to ask you to read the whole thing.

A Okay. I don't see it on the front page.

Q If you look through the --

A I am sure I will come to it.

Q What?

A I imagine I will come to it, but I haven't yet.

Q Do you see an additional article to the lead article by name M. Naughton of The New York Times?

A Yes.

Q Called "History Played Out on Familiar Stage"?

A Yes, I do.

Q Do you see a couple of pages further an article entitled "Ford Before Panel" by John Herbers?

A Yes, I do.

Q Do you see further on "Testimony Contradicts Accounts on Haig"?

A Yes, I do.

Q By Phillip Shabeloff?

A Yes.

Q Thereafter do you see The New York Times editorial "The President Testifies"?

A I do. [502]

Q Do you see the James Reston piece entitled "Don't Sell Ford Short"?

A I do.

Q Is it still your testimony that Mr. Ford's appearance before the Hungate Committee was covered only by little fillips or had little coverage in the news?

MR. ABRAMS: I object to the form of the question. The witness did not so testify. The witness has not been given a chance to read the articles, anyway, if Mr. Zissu really wants him to.

Q I think it was in your

deposition you said it had not been covered in the press. Is that still your testimony?

A That the hearings themselves had not been --

Q Covered?

A Why don't you read me my statement?

THE COURT: I will overrule that objection in light of page 87.

Q Lines 18 and 19:

"But they had never been covered as news stories at the time so the public wasn't aware of them."

A I thought what I was saying there was in reference to whether the documents you were asking me about had not been covered at the time, and so the public was not [503] aware of them. That's all I can say. I obviously was

aware the pardon by one president of another was a major news story and still believe it continues to be one.

MR. ZISSU: I mark as Exhibit 50 for identification a similar microfilm copy of portions of the front page of The Washington Post of Friday, October 18, 1974.

THE COURT: The first meeting with Haig and the second and the follow-up phone call are in the Times of October 18th, both of them.

THE WITNESS: Right.

THE COURT: So the only thing in the Times of the three items recited is the Ruth Memorandum?

THE WITNESS: I would respectfully argue, your Honor, that that may go to what I said in answer to a specific

question at deposition. It does not go to the question of whether the story we wrote was a newsworthy story, because they are in The Times buried, and I talked about a news consciousness. They are in The Times. That is not the headline in The Times. The headline is, "No Deal Made." That is the headline I remember in The New York Times. You have to read far into the story to get into those particular documents. Once you get them they are in the context [504] of "No deal" and what is newsworthy to me is the context in which I put them in the story in "Behind the Nixon Pardon."

THE COURT: The question from counsel on the deposition was whether these items were new detail. You said,

yes, they are, and you said they had not been covered as news stories and yet those two items of detail are in fact covered in the story.

THE WITNESS: Well, I concede that, and as I say to me they did not penetrate the news consciousness of most people, including myself.

THE COURT: Including yourself?

THE WITNESS: Yes. And, as I said, had I known that, I would have written this story but I would have said despite the fact these documents were released before and reported on before, they have not been scrutinized in this context, and that the advent of the new information that President Ford provides in "A Time to Heal," including the conversations with Hartmann, Marsh, and

Harlow, makes one -- causes one to reevaluate them and put them higher up, in effect.

THE COURT: What did that add, the conversations with Harlow and Hartmann, in your judgment?

THE WITNESS: To me, your Honor, it adds [505] two things. The first says that three of the people most intimately involved with the process the way only staff people can be, felt that this conversation that he had with Haig had either -- had at a minimum the appearance of impropriety, or, as they call it, trouble, or as they call it, a time bomb.

THE COURT: They thought that he, by letting Haig go out of the office without saying anything, he might have left the impression that he was --

THE WITNESS: Made a deal.

THE COURT: No, that he was not uncomfortable with the suggestion. That is the way it was put in the book.

MR. ABRAMS: There is more in the book. I don't want to lead. May I suggest to you the bottom line of that paragraph.

THE COURT: That is what Mr. Hartmann says.

MR. ABRAMS: I don't want to tell Mr. Navasky, but I suggest you direct your attention to the last line.

THE COURT: I will let you deal with those things on redirect, if necessary. In the Hungate hearings is not the same thought conveyed by the President's testimony where he says, at page 95, "I had not given any advice or

recommendations [506] in my conversations with his aides," which means Haig, among others, "but I also did not want anyone who might talk to the President to suggest tht I had some intention to do so." Now, that is a suggestion that he's saying, "I didn't want anybody to take the fact that I had not said anything to be a recommendation," right?

THE WITNESS: My memory of the Hungate testimony, your Honor, is --

THE COURT: That is what I am reading to you.

THE WITNESS: In context it was that he made the reader and the listener feel it was his idea to go back and make the phone call, and that he may have had one conversation with St. Clair but that it was his idea to do this. And what my

reading of the manuscript told me was that he had three of his most trusted aides who were alarmed to the point of using language like time bomb, and suggesting that he might have made a deal. Silence implies assent. Which was what was new and what made this thing in the politics of 1979 worth resurrecting these documents from page -- wherever they ended up inside The New York Times -- to page 1.

THE COURT: Two thoughts then. One, you [507] did not list that as a new detail that sprang to your mind when you read this article and read the typescript in April of 1979.

THE WITNESS: That's correct.

THE COURT: Then may I ask you what is it about the fact that an advisor

calls this to his attention that makes it of this supervening news quality as opposed to it having come to him on his own reflection? What is the difference?

THE WITNESS: Well, if you accept, as many people may, a majority of people may, President Ford's own version of what happened, which is the way you characterized it in your question to me, then it would be of limited significance. But if you accept the possibility that either there was an obstruction of justice or if you accept the view of Harlow, Marsh and Hartmann that it had the appearance or the possible appearance of a deal, then one learns that it was not -- two possibilities. Number one, it was not Ford's own idea to do it, and number two, he might not

have called back. There indeed might have been a deal and no subsequent conversation had it not -- with Haig -- had it not been for his conversations with these three aides. So that history might have taken a whole other course.

[508]THE COURT: But the fact that was revealed in 1974 was that he had the conversation with Haig, and Haig left without getting any response. That's where you say you saw the potentiality of an obstruction of justice.

THE WITNESS: That's correct. [509]

THE COURT: Whether or not you are right in that surmise, the fact is that he made it perfectly clear the next day in a phone call to Mr. Haig that he was not making any deals with him?

THE WITNESS: Right.

THE COURT: That, too, is an undisputed fact. The only question that is open is in the meantime whether or not he, on his own, or he, at the suggestion of some aide came to the view that the phone call to Haig should be made. Now, I am saying to you what difference does it make when on his own he came to that view or whether some aide called it to his attention and said, "Mr. Vice-President, you better disavow this because the implications are ones that are troublesome." What difference does it make whether the aide says that and he is thinking about it and he says, "You know, you let Al go home and he might be reporting on this, and I'm not sure I'm happy with that." What's the difference?

THE WITNESS: First, let me say --

THE COURT: To make it newsworthy enugh to publish the article?

THE WITNESS: I think it's appropriate that [510] we publish an article about that whether or not it made a difference, but I want to tell you what I think the difference is. I think the difference is that there is a third possibility which you haven't mentioned, and which is that there was -- let me say The Nation is not a magazine which easily adopts conspiracy theories. We don't believe the assinations were conspiracies, we reject most conspiracy theories. Nevertheless, occasionally there are deals made in high political places, arrangement, etc. What this raised for me was the possibility that a

deal was made and that it was not as President Ford suggested, that he called back and meant what he said in conversation No. 2. There is the possibility that this second conversation, after talking to his aides, was made for the record pro forma so that he could say he put in that there was no deal when in fact there may have been a third phone call to General Haig, which none of us know about, or a private conversation with General Haig saying for the record I am going to read you this statement but you go ahead and proceed as planned.

Now, I raise that third possibility, and I did not raise it in the article because it's remote enough so I didn't feel comfortable. I did not have a [511] chance to go back to the record --

THE COURT: And you have no evidence?

THE WITNESS: I have no evidence, except I have the statements of these three aides which to me -- I was as troubled by them as they were troubled by Ford's silence -- and to me that is appropriate news in the politics of 1979, because you have two candidates for the Presidency of the United States who might have been involved in a deal, and you, your Honor, don't accept this as proof that they are involved in a deal, I don't invoke it as proof that they were involved in a deal, but I do see it as raising the possibility that they were in a newsworthy enough context that I reported it. Not only did I report it, but what we reported was then

picked up in other newspapers because they saw it as newsworthy, and the Reader's Digest reported it because it saw it as newsworthy. So that would be to me validating it.

THE COURT: You don't mean to suggest that in its being picked up in any way there is any conspiratorial aspect here?

THE WITNESS: By "conspiracy" I mean a deal, that there was something else going on beyond what [512] Ford admitted to in his memoirs. I don't say that there was. All I say was that that conversation raised the possibility of an obstruction of justice, of a deal, and I felt it was real enough to write a story off of it.

I believed at the time that the

Haig conversation was news, and it turns out it was not news in the sense that it was on the record before. I still believe it was news in the sense that in the configuration of these events in that '79 context it was new information to the public who were trying to make an evaluation of their presidential candidates.

THE COURT: Can I ask you whether it occurred to you that equally with your theory it was entirely possible that Ford was thunderstruck at what Haig said to him and was frankly just sitting their listening, taking it in?

THE WITNESS: Your Honor, it did --

THE COURT: And after Haig had walked out he then began to assess the pieces and put them together. Is that entirely possible?

THE WITNESS: That is entirely possible. But it wasn't the implicit argument of the piece that I [513] wrote.

THE COURT: I understand that.

THE WITNESS: Okay.

* * *

[517]

Q I would now like to read to you some further portions from your deposition, Mr. Navasky, relating to your testimony yesterday, and ask you if you were asked these questions and gave these answers starting at page 37, line 2 and continuing through -- line 15, I am sorry, continuing through to page 39, line 2:

"Q What was your purpose in publishing the article?
"A The article in my judgment was extremely newsworthy and it was news with policy significance. That's what we try to do every week, publish articles that are newsworthy and have policy significance.

"Q What do you consider the news?
"A The news in my judgment was that President Ford had had a coversation with Alexander Haig that was possibly an impropriety at the highest level of our government because it suggested there was possibly an obstruction of justice in the transaction. And what was particularly newsworthy was that in the book there [518] were documents that Ford quoted from that, as far as I was aware of at the time -- I have since discovered that they are in the Congressional Record -- were being published for the first time that confirmed his account.
"Q Are there portions of your article that go beyond references to those conversations?
"A Yes.There were other pieces of news. There were other tidbits of news in the book, so I used some of them, not all of them, in the article.
"Q You mentioned documents that are referred to in the article that you have since learned were available in the Congressional Record.
"A Some of them were.
"Q What documents at the time did you believe were unavailable to the public?
"A I still think this one was unavailable. The one I cited from Henry Ruth, Jaworski's assistant I quoted in the article. In addition, the thing that was so striking to me was the written statement that Ford read to Alexander Haig after his conversations with his aides saying that

he has no intention of recommending what the President should do about resigning or not resigning, after they had had a conversation the previous day on that matter." [519]

Were you asked those questions and did you give those answers? Yes or no, please.

A To the best of my recollection, yes, but I would have to see it before me if you want me to give you a yes or no.

Q At page 83, on line -- starting on line 17.

A Excuse me, this is my testimony yesterday?

Q Your deposition testimony.

A I see. [520]

Q Page 83 commencing at line 17:
"Q If the information" --

A Could I --

Q Do you want a copy?

A I would like a copy if you are going to ask me follow-up questions about it, yes.

Q I am not sure I will. I am just asking whether you gave that testimony at this point.

THE COURT: What's the page?

MR. ZISSU: Page 83, your Honor, of the deposition.

THE WITNESS: If you say I gave it, I will assume I gave it. I assume you are an accurate reader. I really want it in front of me to make sure it is in context if I am going to be asked anything about it beyond that.

MR. ZISSU: We will try to do that.

Q Page 83:

"Q If the information, the same information was to have been disclosed some four or five weeks later one way

or another in a publication, what was the policy significance on the hot news aspect of it in your view that would have led you to feel you needed to publish it three or four weeks in advance? [521]
"A When I said -- if that's what I said -- to Mr. Fish, 'I think we have a real hot news story here,' I wasn't referring to the possible appointment of Edward Bennett Williams at the head of CIA. I was referring to the story about the pardon of the former president, Richard Nixon, by Gerald Ford and the possible obstruction of justice and the memoranda that we reproduced in the magazine. That seemed to me to be the hot part of the whole story."

Through line 6. Mr. Navasky, have you had a chance to read overnight Plaintiffs' Exhibit 48 and 49 for identification, the two newspaper articles, one from The New York Times and the other The Washington Post?

A Yes, I have.

Q And I believe yesterday you testified that the press did not give

the possibility of a deal on the pardon particular scrutiny and that the revelation of Mr. Ford's discussions with his aides made the possibility of a deal new in 1979. Is that still your testimony?

A I would have to look at the exact language but --

Q Did you read it overnight? [522]

A Yes, I did.

Q Is it still your testimony that the press didn't give scrutiny to the possibility of a deal?

A It is my testimony that the coverage of the press that I read overnight, that you gave me, would have confirmed me in my judgment that what we published in 1979 was newsworthy and that the news consciousness of the general public, as informed by the articles

you gave me, would not have included any knowledge that President Ford read a written statement to General Haig, that -- there were all kinds of new details in the book that I included --

Q I asked you about the possibility of a deal on the pardon. Is it your testimony that the press did not give scrutiny to that potential or alleged impropriety in those articles that you read?

A It is my testimony that the headline on those articles was the thrust of those articles. That there was no deal. And that you have to read very far down in the article to get any sense of what the argument was about, and even after you read that far, you didn't get a sense that really was a

possible obstruction of justice. That I got from the book.

Q Is there any way of giving more emphasis [523] to the lead story than making it the lead story with a banner headline?

A No.

Q And isn't it true that the lead stories in most major newspapers are frequently continued on subsequent pages?

A Yes.

Q They can't put the whole story, if it is a long one, on the front page?

A That's correct. But one's news consciousness is determined by, in inverse proportion to the placement of a fact in a news story and that's why you

put the most newsworthy things at the top and the least newsworthy things at the bottom. The critical point, as any newspaper man will tell you, is the jump, what is before the jump and after the jump. In this case what happens is the most material facts that I have since learned after my deposition and after we ran our story, that were in the book, that were not in the newspaper, are not in the newspaper coverage at all. [524]

MR. ZISSU: I want to mark as Plaintiffs' Exhibit 51 -- that was 49 and 50 yesterday. This is 51 for identification; a photocopy of a New York Times article by Herbert Mitgang, dated April 4, 1979.

Q I want to shown it to you, Mr.

Navasky, and direct your attention to some red lining.

(Pause.)

Q Can you read to me --

MR. ABRAMS: Do you have a copy, Mr. Zissu?

MR. ZISSU: I don't have a copy.

MR. ABRAMS: Do you mind if I go up to the witness?

MR. ZISSU: No, I don't.

(Pause.)

Q Could you read the language where the red lining is?

A "The material summarized for the Ford book has for the most part been reported previously in the press."

Q That is a reference to The Nation article, is it not?

A That is unclear, but you can read it as easily as I can, I assume.

[525]Q The story is about Mr. Navasky article, is it not, in The New York Times?

A Yes, it is.

Q Is it your testimony that you disagree with that statement? Yes or no, please.

A Would you re-read the question, please, is it disagreed or disagree?

Q Disagree.

A In part. I would have written it "much of the material summarized".

Q I would like to leave that --

A But the most significant --

Q Excuse me, please, Mr. Navasky. How you would have written it, I will leave to Mr. Abrams on redirect, who is eminently capable of bringing

that testimony out. I like to offer in evidence all three of these articles, two from yesterday and 51 from this morning.

MR. ABRAMS: Your Honor, I have no objection to the admission into evidence of Plaintiffs' Exhibit 49 and Plaintiffs' Exhibit 50, The New York Times and Washington Post articles referred to yesterday.

THE COURT: Those will be received.

MR. ABRAMS: I do object to the admissibility [526] of the document today. It seems to me to have no probative value at all that Mr. Mitgang of The New York Times was of the opinion that much of the material had been published before, unless Mr. Mitgang is to be called here as some kind of expert.

The witness has been asked one question about the article, he has responded to it. There is nothing else in the article which is admissible. What Mr. Knowlton of Harper and Row had to say is not only prejudicial, but clearly inadmissible.

The article is heresay and it is prejudicial and it is irrelevant.

MR. ZISSU: Your Honor, I would restrict it to the portion that the witness read out loud. I think it is evidence of the perception of the press as to what was new in The Nation's article. It was published contemporaneously by a leading newspaper and a leading reporter.

MR. ABRAMS: Your Honor, if that is the basis of the proffer, I will

withdraw my objection as to that sentence.

THE COURT: All right. It will be received to that extent.

(Plaintiffs' Exhibits 49, 50 and 51 were received in evidence.) [527]

Q Mr. Navasky, is it correct to say that the purpose of then President Ford's historic appeal before the House Committee was to deal with the pardon issue and the concerns in the country about impropriety?

A I can't --

Q You disagree with that?

A No. I mean, what was his real purpose. Those were obviously some of his purposes.

Q So your testimony is you don't know, or you dispute that?

A No, I say I can't know what his ultimate purpose was, but those seem reasonable purposes.

Q Yesterday, Mr. Navasky, I think you mentioned that even the Reader's Digest had picked up upon your article and the conspiracy or deal theory on the pardon --

A No, I don't think I said that.

Q What did you say?

A I thought I said that they used very close to the front of their article the material related to the Ford-Haig conversations, just as I used material related to the Ford-Haig conversations very close to the front of my article. I didn't mean to suggest that they took from or read or knew about The Nation article when they decided what

they were going to publish. [528]

Q We are talking about the Reader's Digest article that has been referred to as a serialization or second serialization that was authorized by the plaintiff.

A That's right.

Q Is it fair to say that your April 7, 1979 article mentions that the Ford Memoirs contain new detail but does not thereafter spell out or label detail by detail what the new details were? Is that a fair statement?

A Not entirely. It seems to me what is fair in it is that I do not label, this is new, that is new, the other is new, but that what is in my article contains a lot of new detail for a 2,500 word article. Certainly not

anywhere near what is in the 600 page book or however many pages the Ford book is. I want to correct that not exact number of pages. It's not 600. In manuscript form it was 600.

THE COURT: Four hundred and something.

Q Am I correct that you testified also in your deposition that The Nation magazine would not have taken such a club-the-reader-over-the-head approach to such a topic as alleged impropriety at the highest levels of government and that in the 116 years of its publishing history The Nation doesn't write that way?

MR. ABRAMS: Can I have the page reference, [529] please, Mr. Zissu?

MR. ZISSU: I will, if he has any doubt about it.

THE WITNESS: I'd like to see the testimony. You are putting a cast on it a little differently than the way I said it, I think.

Q At page 89 of your deposition at line 15: The question is, were you asked these questions and did you give these answers:

"Q Is it fair to say that the article does not attempt to go through the facts and say what is new and what isn't new other than to suggest it by organization?
"A I think it implicitly tells the reader then explicitly tells the reader there are new details. It does not label detail by detail. We wouldn't do that and we haven't done it in the 116 years of publishing."

Was that your testimony?

A If you say that is what I said, yes.

Q Are you familiar with all the articles that The Nation has published in its 116 years of history?

A The spirit in which I gave that statement--

Q No, are you familiar? [530]

A I am more familiar than most people, but I could not recite article by article, word for word. But I did before I came to The Nation attempt to read through the magazine, starting in 1865, believe it or not. I did not read every article word for word, but I looked at every volume in the library at Princeton.

Q You do keep old issues?

A Yes, we have a complete set -- well, there are one or two volumes missing, but we have a set.

Q Are you familiar with the articles over the last ten years?

A I am roughly familiar with

them. Again, not article by article, and you undoubtedly could find one that is chronologically organized, but it wouldn't change the basic thrust of my statement.

Q What about articles from November of 1974, are you familiar with any of those?

A You'd have to --

Q I am going to show you an article.

A I'm sure you have got one.

MR. ZISSU: And I am going to mark as Plaintiffs' Exhibit 52 for identification an article which appeared in the November 9, 1974 issue of The Nation, entitled, "Some Gaps In Ford's Candor." It has [531] a preheading "The Notorious Pardon," by Bill Nigut -- is that correctly pronounced?

A I don't know. I wasn't there in 1974. I don't know how to pronounce it.

Q Have you ever seen that article before?

A I don't remember reading this article in particular, but I might have.

(Plaintiffs' Exhibit 52 marked for identification.)

A I subscribed to the magazine at that period.

Q You want to read it for a second?

A Well --

Q Let me see, you may not have to.

A I would like to read it all the way through very carefully if you are going to ask me probing questions about it.

Q If I do, I will give you a chance.

A Okay. [532]

Q In any event, Mr. Navasky, on the subject of the known record and prior press coverage of the pardon, did you look into the possibility that The Nation itself, your own magazine, had covered these very matters in 1974?

A The Nation, alas, when I arrived there, did not have an index to its back issues, and we did not have a morgue that covered them. So we did not look into that in that way. It is my memory, however, that during that period we did subscribe to The New York Times data bank, which had forty different periodicals on it and that what we may have done was, we may have conducted a

search through the data bank to see what there was there.

Q Are you testifying that before you wrote and published the April 7, 1979 article in The Nation, you conducted a search?

A No, I'm not. I am saying that is what we might have done.

Q That is what you might have done.

A Yes. I'm not saying we did that.

Q Did you do it?

A Pardon me?

Q Did you do it?

A I said I'm not saying we did that.

Q But I want to know whether you are saying [533] you did do it, yes or no, did you do it or didn't you do it?

A It is not my testimony that we did that, because I don't have a specific memory that we did that.

Q In other words, you did not do it?

A Well, I don't want to make --

Q If you will not refer to your answer as to whether it is your testimony, just answer it yes or no.

A It is not my memory that we did that. But I will leave the door open. We might have done it.

Q Did you know about this article when you wrote the April 7, 1979 Nation article?

A Not specifically. But it wouldn't have made --

Q Whether it would have made a difference, I will leave that to Mr. Abrams, again.

A Okay.

Q Now we are going to again go back to your deposition testimony, Mr. Navasky, at page 121 and ask you again were you asked these questions and did you give these answers:

MR. ZISSU: At this time I would like to offer into evidence The Nation article, Plaintiffs' Exhibit 52, in evidence. I'd like to offer that in evidence.

MR. ABRAMS: I haven't finished reading it, [534] your Honor, and I don't know for what purpose it is being offered.

THE COURT: 52 is what?

MR. ABRAMS: The Nation article.

MR. ZISSU: That is evidence not only of the known record of what was

covered in the press, but was covered by the witness' own magazine.

MR. ABRAMS: Could I have a minute to look through it, your Honor?

THE COURT: Yes.

(Pause.)

MR. ABRAMS: Your Honor, without conceding the relevance of the document, I have no objection.

THE COURT: Received.

(Plaintiffs' Exhibit 52 was received in evidence.)

Q I believe you may have inadvertently made some notations on the documents.

A Advertently.

Q You may not have realized that was the original for the Court.

A Right.

Q Did you say before that you were a subscriber to the Nation in this period? [535]

A Yes.

Q Turning to page 121 of your deposition, I am going to ask you whether you were asked this question and gave this answer, starting at line 17:

"Q Is it fair to say that the article consists of either quotations or paraphrasing only from the manuscript?
"A The article, in my judgment, is three things: number one, it is a news story in the classic mode about a news event, the news event being the publication of the book of a former president; number two, and more importantly from our perspective, it is by our organization of materials and by my selecting out and isolating elements of the process by which the pardon came about, the revelation of a possible obstruction of justice at the highest levels of the polity and as such is of major significance, not only newsworthy significance at the time, but also historical significance; number three, it is a newsmaking article. The fact of number one and two, makes us think that it is newsworthy in and of

itself, and that is why we rushed into print."

I want to direct your attention to the first, number one, "It is a news story in the classic mode about a news event, and the news event being the publication [536] of the book of a former president."

With regard to that statement that your article was in the classic mode about a news event, the news event being the publication of a book, it's a fact that when you wrote this article and published it that there was no publication of Mr. Ford's book, isn't that true?

A Perhaps I should have said anticipated publication of a book.

Q Or an unpublished manuscript would be more accurate?

A The news event was that this is what Ford was saying in his book.

Q Is it your experience that it is in the classic mode to write news stories about unpublished manuscripts?

A It would not have been a news event if I wrote this story a week after the book was published because it would be those facts and that news would have been generally covered in the daily papers thereafter and, moreover, it would have been covered in a way that didn't highlight what I thought was the policy news.

Q What was so important about getting that news out a matter of weeks before it was coming out anyway in the book?

A There are a number of things

that went through [537] our mind. First of all --

Q Let me --

MR. ABRAMS: Judge --

THE COURT: Let him answer, Mr. Zissu.

MR. ABRAMS: It's an open ended question.

Q I was going to say your mind at the time.

A My mind at the time as I best remember it at this time. First of all, we publish a weekly magazine, and we want to be the ones to get out the news. So that it is in our magazine's interest and tradition to try to break stories. We want to do so within limits of propriety, within the limits of our own -- the interests of our editorial interests

and, of course, within the limits of the law. Secondly, in this particular case what was important to us was that we wanted to get out not just the news facts of the case, but we wanted to get them out in a way that put them in the context of our opinion that there was a possible obstruction of justice, which was the reverse of the news stories that were written some years earlier, where the headline was there was no obstruction of justice, there was no deal.

It was our judgment that this material provided [538] new evidence that there was a possible obstruction of justice. Then there were other news items, such as the story about the photographer, the business about Nixon's comments on Connally, and the Rockefeller

withdrawal, which seemed to me appropriate -- it wasn't necessary that we get them out two weeks ahead of time, or what really was four weeks or six weeks, because we didn't know what Time was going to publish, but it was appropriate for us to put them in a news story.

Q I think this is in line with your deposition testimony that once the Ford book were published there would be no news value in isolating the story of a possible impropriety. Is it not true that any particularly persuasive analysis or insight in this question would be of the same general interest to intelligent readers of your kind at any point, even after 1974? Isn't that true?

MR. ABRAMS: I object to the form of the question. The reference to the deposition seems to me --

THE COURT: I will permit it. Overruled.

A It is true that a persuasive analysis might persuade intelligent readers regardless of when it appeared. However, the ability of one to get one's analysis to the attention of the largest possible audience in our judgment, in my judgment, was dramatically affected by the opportunity [539] we had to publish in advance of publication of the Ford book. And it was my judgment at that time that we had the opportunity to make some news by doing so, and that that news would possibly get one of the wire services to pick it up, which happens maybe six times a year to a Nation story, and that that wire service story would bring that news to the attention

of an audience of millions, whereas The Nation Magazine reaches an audience of 40-odd thousand, or at that time less than that.

Q I think yesterday on this subject you testified something to the effect that after the book came out there would be no chance of making news and that the public could not read Ford's book through the -- the public would not then be able to read Ford's book through the screen of questions that The Nation raised in your article?

A Correct. [540]

Q Is it your testimony that fair comment of this kind means putting your screen in front of the public before the author has had his chance to tell his own story in his own book?

A It is our testimony that what you call fair comment, I don't know if you are using that as a term of art or just --

Q I am not using it as a term of art.

A Yes, that if a former president who writes a book that contains news which he had access to as the result of his public office, it is fair for The Nation Magazine or any other magazine that gets access to that news to publish it if they are technologically able to do so the day after they get that news. It is not fair for them to take his literary effort, but it is fair for them to publish that news.

Q You think that the public would see these questions in your

article by what you call your configura-tion or inverted pyramid style?

A I hoped that our article raised questions about the propriety of the conversations that were held before and after between -- before and after Ford had talked with his aides between Ford and Haig, and that those questions would be a form of instruction or added [541] data for editorial writers around the country who might be exposed to our story and for citizens around the country and more particularly for our own readers. That was our hope, my hope.

Q Mr. Navasky, I want to show you Defendants' Exhibit A in evidence, which is photocopies of material from the plaintiff Harper & Row's publicity

kit for the book "A Time to Heal". When did you first see that or a copy of that material?

A To my best memory, I didn't see it until quite late in this lawsuit.

Q So you never saw that before you published your article?

A I did not see it at the time I published the article, no. I am glad to see it says it is a lot of news.

MR. ZISSU: I would ask that be stricken, your Honor.

THE COURT: Strike that out.

THE WITNESS: Sorry.

Q I think yesterday, Mr. Navasky, I read to you from some deposition testimony in which you stated that you would have written your story from the documents if you had known that they

were available, and I referred [542] to pages, I think at pages 55 and 56 of the deposition. My question now is the following: It is not true, is it, that your purpose in writing the article was to present Mr. Ford's personal and subjective feelings as expressed in his manuscript?

A That wasn't my ultimate purpose, no. Occasionally a feeling has policy relevance and the language in which he expresses it is inextricably bound up with the fact that I would have to describe to make my news policy point, so --

Q And you were not interested in former President Ford's style, were you?

A We were not interested --

Q His literary style?

A -- in appropriating his literary style, no.

Q And if, as you have testified, your purpose was simply to report the fact that Ford reported these events, then you also did not have as your purpose to comment on the facts or make any independent construction of your own, did you?

A That's wrong, the way I see it, anyway.

Q Is it fair to say that you were only getting out the news value of the book first and had no intention of making any independent commentary or construction, [543] is that a fair statement?

A I don't think so, no.

Q In reporting what Mr. Ford

reported and in claiming that this is only writing about his book as news, are you also saying that it was therefore necessary for you to quote and paraphrase him?

MR. ABRAMS: I object to the form of the question.

MR. ZISSU: Let me finish the question.

Q -- to the extent of 85 percent of your own article?

MR. ABRAMS: I object to the form of the question. The witness has not testified that his only purpose was --

MR. ZISSU: I didn't say his only purpose, but I will go to the deposition. It was one of his purposes.

MR. ABRAMS: If you state a purpose, you can answer.

Q In reporting -- I will rephrase the question. In reporting what Mr. Ford reported and in claiming that this was, in part, only writing about his book as news, are you also saying that it was therefore necessary for you to quote and paraphrase him to the extent of approximately 85 percent of your article? [544]

A I don't accept your quantification.

Q What is your quantification?

A I have to look at our brief to refresh my recollection, but my impression was that we had quoted under 500 words and that -- and of those a lot of them were arguably not his to copyright.

Q What about paraphrasing?

A And that while when one writes -- whenever one writes about a book in a conventional essay or book review, one use of the term is paraphrase, and in that sense one could say that everything one writes about a book is a paraphrase. However, in reading my article sentence by sentence one would see that some of it is paraphrase and other of it is synthesis and other of it is judgment and other is description. So one would have to go through it carefully and see which came -- which is close to the Ford book, which part of the Ford book, et cetera. But I didn't pretend that this was anything other than a description of those news aspects of the Ford book that I regarded as adding up to a possible obstruction of justice, plus that other

news which was appropriate to put into such an article.

Q Even taking our figures of 85 percent or [545] the figures you mentioned, isn't it usual to paraphrase far less than that in an article of this type?

MR. ABRAMS: I object to the form of the question.

THE COURT: No, I will permit it.

A I read last Sunday's front page New York Times book review --

Q I would ask that you not discuss other articles --

THE COURT: I will let him answer it that way.

A Last Sunday's front page New York Times book review essay on the Ehrlichman book seemed to me to contain

more quotes per inch, more news per inch, as much paraphrases or more than The Nation article, and it was a very good essay and --

Q I ask you again --

A And it dealt with the same subject.

Q I have a couple of questions for you about that. My first question, is it usual to paraphrase this much in your kind of article, not a book review?

A It is not usual for The Nation to get a hot news story. We get only about six of those a year. But when we get one, we, within the bounds of what's legally possible, will do something that's unusual for us. [546]

Q You don't want to answer the question?

MR. ABRAMS: I object to the form of the question.

A I am trying to answer your question.

Q Will you tell me whether it is usual to paraphrase and quote this much in the kind of article you have described that you wrote on April 7, 1979?

MR. ABRAMS: Asked and answered. Objection.

MR. ZISSU: It has not been answered.

THE COURT: Let me hear it again.

(Question read.)

THE COURT: Overruled.

A Can I ask you, is it usual for who, for me or the writers at large?

Q Well, let's say writers at large.

A I would say, as I said yesterday, there are two different models for the kind of article that could have been written out of this book that occurred to me at the time. Both of them would be conventional models. One would be a kind of editorialized mobilization of information and the other would be the kind of mobilization presented as a factual matter, but with a real policy implication. And to do that requires some paraphrase.

A Is it usual to quote this much? [547]

A Yes, my --

Q I want to focus on the sum. Is it usual to take this much?

A My sense was that I took the appropriate amount for the subject that

I had and to that extent, what is usual -- you have to look at things case by case. What is usual is to take the appropriate amount and what I took was the appropriate amount. In that sense, I would say yes, it is. [548]

Q You are not testifying that your article was a book review, are you?

A No.

Q Isn't it a fact that book reviews come out either in conjunction with or after publication?

A It is a fact that most book reviews do. Many book reviewers feel free to publish as soon --

Q I don't want to hear what most book reviewers --

MR. ABRAMS: I object to that, your Honor. The witness was in the middle of answering.

THE COURT: I do wish the witness would listen to the question that's asked him and answer that question, so I will strike out this answer. Let's have the question read back, please.

(Question read.)

THE COURT: You may answer. I want you to answer that question first and then we will get another question and then we will go on, all right.

THE WITNESS: Yes, your Honor.

Q Now, I will ask you, Mr. Navasky, if you were asked this question and gave this answer at page 68 of your deposition, starting at line 11.

"Q Are you saying that in order to accurately report on the book from the news perspective [549] you inevitably adhere closely to the language of the author of this kind of work.
"A I am saying it is a convention of writing about books to paraphrase occasionally."

Did you give that testimony?

A If you say so, yes.

Q I do.

A Yes.

THE COURT: It is here. (Indicating.)

THE WITNESS: Yes.

Q Do I understand your testimony yesterday and today is that without your article, other columnists, newspapers and reporters would not have focused on the possibility of the impropriety?

A No.

Q Is it fair to say that you regarded your publication of the April 7, 1979 article as part of the competition among competing publications, namely, The Nation and Time Magazine?

A I don't think it is fair to

say that, no. Your Honor, I am really not sure whether I am supposed to say any more or not.

Q That's fine. I will show you Plaintiffs' [550] exhibit 18 in evidence, which is appendix A. This is, I think, either typed notes or a typed version of your draft of The Nation article, and I will direct your attention to the second to last page that has a paper clip on it.

A Right.

Q These are your words that are typed here, is that correct?

A I believe they are, yes.

Q And I am asking you to look at that whole page really, the lower half, it is only a small typed portion. Wasn't the basic reason that you decided

to publish this article, as you did, your personal view that it is the public's right to own these works or the profits therefrom without regard to what was allegedly new, old or anything else?

A Was it my purpose, did you say?

Q Yes.

A No.

Q Let me read to you, this is on the second to last page your own words. "It is not merely a matter of law, fair comment, nor a matter of healthy competition among competing papers, although those are part of it." [551] That's the first thing I would ask you to direct your attention to. Isn't it your position and wasn't it your position at the time that your publication of The

Nation article was, part of it was that it was the healthy competition among competing papers?

A That that was the purpose of it?

Q No, that your decision to publish, that part of that decision and part of the purpose of it was that this was a matter of healthy competition among competing papers?

A Well, I didn't think of it in those terms.

Q You wrote these words?

A But I didn't publish these words. This is an early draft that contains a lot of things in it that --

THE COURT: I think then the question to you, Mr. Navasky, is do you stand behind the underlying principles

of those words, even if they were in an early draft?

THE WITNESS: I believe competition among magazines is healthy and that part of our reason for publishing was that we wanted to win the fair competition among -- to get out the news as soon as possible. [552]

Q Now, let me direct your attention to the next sentence where you stated:

> "It is also as W.A. Schnapper has suggested in these pages and elsewhere, a matter of the public's right to own these works or the profits therefrom."

My question is, is that your position, that these works, meaning the manuscript of the former President, that the public has a right to own those works and the profits therefrom, is that your position?

A As a matter of social policy, I believe that the law -- I believe that the public has a right to get access to news at the same time that former public officials do. I also believe that former public officials have the right to write and copyright their works and make a profit from it.

Q Was that view a motivating factor in your decision --

A It wasn't --

Q -- in your decision to publish this article?

A It wasn't a main motivating factor in our decision to publish this article.

Q Is it still your position that President Ford expropriated the news from the public in writing his memoirs?

[553]A Where do you -- where do I say that?

Q Let me go to page 109 of your deposition.

A Right.

Q Starting at line 9.

"Q In Plaintiff's Exhibit 14 for identification there is with reference to news that Gerald Ford expropriated from the public. What news did you mean that President Ford expropriated from the public?
"A For example, the Henry Ruth memorandum.
"Q What other examples are there?
"A Well, again, it is his reading the document which he read with reference to the Haig conversation.
"Q Are there any others that you would say he expropriated from the public?
"A Again, it is our configuration of these tidbits and passages, all of which were based on public documents. That is what I was referring to there."

A Could you tell me what is Exhibit 14? Is that our editorial?

Q It is probably the editorial

from Cornering History dated May 5, 1979. I believe it is in evidence. [554] It could be the other one, Profits -- it is the other one, Profits of History, which is Plaintiffs' Exhibit 21 in evidence and I will hand it to you. An editorial.

THE WITNESS: Your Honor, can I make a -- I have listened carefully to the question but I think it is important to make a distinction between my motive for publishing the article and what I wrote in an editorial after the article was published. I would like to speak to that question as part of the answer to this question.

THE COURT: Okay.

A After we published the article and were threatened with a lawsuit by

Harper and Row, I got intensely interested in the public policy question of who owns the news as it were, and I went and did -- we began some research on that matter and in connection with that research I came to believe in a strong fashion that as a matter of social policy the current situation with regard to the President's papers is a confused one and that it ought to be clarified and it ought to be clarified to the public's benefit. So that's my belief and that is the principle behind which I would stand today.

As to the specific items you read me I would now make distinctions among them and I do believe [555] that Ford reading the Haig memorandum is a piece of news that was not available to the

general public at the time of the Hungate Hearings. There were a whole set of circumstances surrounding that ritual that were not available to the general public at the time of the Hungate hearings and only became available to me when I saw that manuscript, when they read the book or read The Nation article.

As far as the original memorandum, I think it was not part of the news consciousness of the general public, although it had been quoted, buried in the Jaworski book in the middle of something else, and I have no knowledge whether Ford asked copyright permission for that or whether that was something that was generally available beyond that buried place in the Jaworski book. [556]

Q But you were not intensely interested in these matters before you published your article?

A They were not my primary motive. The primary motive was that the article in our judgment was newsworthy and policy significant. I would give that a question of the public papers, at that point, a low percentage if you want to quantify motive.

Q Is it fair to say that you weren't intensely interested and didn't pursue these matters before you published the article because you were in a rush to get it out?

A Yes, it is fair to say that I tried to and did write that story over a weekend within, as I remember it, to my best recollection, within a 24-hour

period, and I felt that since it had been leaked to us, it could have been leaked to lots of other people and that it was our opportunity to get it out and to get it out in the way that we thought would be socially useful.

* * *

[583]

BY MR. ABRAMS:

Q Mr. Navasky, yesterday you were asked questions about and testified about the passage on page 87 of your deposition in which you set forth three matters which struck you as specially new detail in the Ford memoirs was as you read them. The third set forth on page 87, at page 6, you stated as follows:

> "Number 3 would be the fact that he hadn't told Haig he thought it would be improper to offer to pardon Nixon in exchange for Nixon's resignation at the time they had that original discussion."

What was it that struck you newsworthy about that?

A Well, it seemed to me that what was newsworthy about that was that the potential, once again, president of the United States was insensitive to the possibility of an impropriety and an ethical question that raised the possibility of appearance of an obstruction of justice and had to be instructed on that appearance by three aides who called it a time bomb, who told him silence implies assent and who said it could only cause trouble.

Q As of April 1979, Mr. Navasky, did you know that President Ford's testimony in the Hungate [584] Hearings had

related his failure to respond immediately to Mr. Haig that it would be improper to issue a pardon in exchange for a resignation?

A No, I did not.

Q And as of April 1979, did you know whether or not President Ford had only called General Haig after his aides had advised him to do so and warned him of possible consequences if he did not?

MR. ZISSU: I object to Mr. Abrams' testifying. He is leading the witness.

THE COURT: It is a little heavy handed. Do you want to rephrase it.

Q What did you know in April 1979 as to any consultations President Ford may have had with his aides prior to calling General Haig?

A I knew specifically what I

read in the Ford book and until that point I had not been aware that he had been -- that a possible trigger for those calls was the conversations that he had with his aides. Let me say further that what struck me at the time, it was not just that they told him it would look improper, what it could have been was that since they now knew --

THE COURT: Wait a minute. Wait a minute. [585] You answered a question about one or two back similarly. Only one aide said it would look improper. You read this article and you have indicated that three aides indicated. Only one aide indicated it would look improper. Two aides said that the mention of a pardon caused a problem, public mention of a problem, but only one aide,

as I understand it, said that he might have created a misimpression by not responding, and this is the second time you said that and I just want to be perfectly clear that you focused on your own article.

THE WITNESS: Your Honor, it was my reading of the Ford memoir that Jack Marsh felt that the mention of a pardon in this context, in this context was a time bomb, and I do take that to seem that as --

THE COURT: He did not say that silence implies assent.

THE WITNESS: No, each of them had their different way of saying it. It seemed to me they were all making the central point. That was my perspective. I may be wrong but that's my view.

THE COURT: Let's go forward on that basis.

Q Do you know, Mr. Navasky, whether President Ford at any point prior to the drafting and preparation of his memoir had disclosed that the document -- that what he had said to General Haig was -- came from a written document which he read slowly on the phone to General Haig?

MR. ZISSU: I object. That's a leading question. Mr. Abrams is testifying. The witness has testified on direct and on cross that he didn't know anything about these things.

MR. ABRAMS: I am asking him now. The current question, in light of the questioning yesterday about what was in the Hungate hearings and what not, is

Mr. Navasky's information as of now whether it had ever before been disclosed that what President Ford did was to read a written statement on the phone to General Haig.

MR. ZISSU: I object, relevance.

THE COURT: Let me ask you, I will let you get an answer to that but then there is a necessary follow-up question which has got to be put. You can get your answer and then we will go to the next one.

Q Mr. Navasky.

A I now believe to the best of my knowledge that the first time it has come out that President Ford called General Haig back and read his -- and wrote out [587] a statement in advance, read it over the phone, read it slowly, read

it in the presence of witnesses, was in his book.

Q And what with respect to that did you publish in your article?

A Well, in our article we published that -- we published the statement itself and if I may look at it directly so there is no misunderstanding about it. Ford called Haig and read him a written statement, which was a fact that -- this was the first time to our knowledge, to my knowledge now, this is the first time this was ever on the public record. At the time we published the article I wasn't aware of that. I thought the statement itself was newsworthy. Now I discover that the fact that it was written is what is new about it. The fact that it was read slowly,

the fact it was done in the presence of aides.

THE COURT: What is it about the fact the statement was written that makes it newsworthy?

THE WITNESS: Well --

THE COURT: Because the statement itself is in the Hungate testimony.

MR. ABRAMS: We will be arguing --

THE COURT: I understand. [588]

MR. ABRAMS: May I respond?

THE COURT: I think the witness should respond because he is the one who made the determination.

THE WITNESS: Looking at it now, your Honor, and having read the articles that Mr. Zissu gave me yesterday, what makes it newsworthy to me is that the way it was presented in the Hungate

hearings and the way it was treated in most news stories at the time was as a casual conversation that had no bearing on any propriety or impropriety. When one writes a statement down carefully, when one reads it, when one makes sure there are witnesses present, one is making a record and frequently the motive for making a record is that one feels one is in trouble. So to me, that really now, looking at it again, says, this is major news and new as well as being newsworthy.

MR. ZISSU: Your Honor, all of this testimony is just the witness arguing today --

THE COURT: I am treating it as argument.

MR. ABRAMS: He had been asked a

number of questions yesterday about his view now.

Q Let's go on, Mr. Navasky. Do you have more, Judge Owen, on this subject?

THE COURT: I do have more. That is, [589] I take it that your deposition answer at page 87 where you said that the fact of the statement was the new detail, you now say it is the fact that the statement was written and not the statement itself? You want to change your deposition emphasis to that extent, is that correct?

MR. ABRAMS: Are you asking as of April '79?

THE COURT: As of right this minute.

THE WITNESS: Your Honor, having

read all the materials last night I do want to say that that is what I now consider to be new about it. What I still would say now is that it was newsworthy then because it was not in the public consciousness and in the context of the politics of 1979 and a possible presidential campaign. It leaped out at me that way partly. Maybe I can say in retrospect because it was written. [590]

Q Mr. Navasky, could you now direct your attention, please, to the Plaintiffs' Exhibit 49, which is The New York Times article of October 18, 1974, which was admitted into evidence today, and to which Mr. Zissu made a reference yesterday with respect to all the columns contained in it. Have you now read Plaintiffs' Exhibit 49?

A Yes, I have.

Q I want to direct your attention now separately to each of the portions of it to which Mr. Zissu directed your attention yesterday. Directing your attention first to the page 1 article by David Rosenbaum, is there any reference in there to anything about the Ruth memo which is set forth in the Jaworski book?

A No, there is not.

Q Is there anything in there about the statement that President Ford read on the phone to General Haig?

A Yes, there is.

Q Where is that, Mr. Navasky?

A That is after the jump, and it is the second column over from the left, about a quarter of the way down. Mr.

Ford said he told Mr. Haig he needed "time to think" and the next day, he testified, to talk to St. Clair. He said he called Mr. Haig and he told [591] them that -- and there is the statement.

Q Is there anything --

A There is a paraphrase of the statement, actually.

Q Is there anything in the Rosenbaum column with respect to whether it was written or oral?

A There is nothing in the Rosenbaum column about whether it was written or oral.

Q Is there anything in the Rosenbaum column about whether President Ford had met with any aides previously?

A Other than a talk with James

St. Clair on a different matter, there is nothing in the Rosenbaum column about conversations with any of his aides.

Q Directing your attention now, Mr. Navasky, to the column which Mr. Zissu directed your attention to yesterday, written by James M. Naughton on the jump page -- what do you mean by jump page?

A Well, I mean the page after the page on which the story originally appears. So where it is continued.

Q Referring to the column by Mr. Naughton entitled "History played out on familiar stage" is there anything there about the Ruth memo?

A No, there is not.

Q Or about President Ford's statement to [592] Mr. Haig?

A No, there is not.

Q Or about Mr. Haig's conversation with President Ford?

A No, there is not.

Q I direct your attention now to the column which Mr. Zissu directed you to yesterday, by John Herbers. Is there anything in that column about any of those issues, the Ruth memorandum, President Ford's statement to General Haig, and General Haig's earlier statement to President Ford with respect to the pardon?

A No, there is not.

Q Directing your attention now to the article which Mr. Zissu referred to by Philip Shabecoff entitled "Testimony Contradicts Accounts on Haig," is there anything in that article with

respect to the Ruth memorandum or President Ford's statement to General Haig by telephone, or President Ford's initial conversation with General Haig about the issue of a pardon in return for resignation?

A No, there is not.

Q Directing your attention now to the editorial on the next page which Mr. Zissu directed your attention to, entitled, "The President Testifies," is there any reference there to any of those three topics? [593]

A No, there is not.

Q And directing your attention to Mr. Reston's column on the next page, which Mr. Zissu directed your attention to entitled "Don't Sell Ford Short" is there any reference in that column?

A No, there is not.

Q Could you now direct your attention to the Washington Post article which has been introduced in evidence as Plaintiffs' Exhibit 50, have you read that article?

A Yes, I have.

Q Is there anything in there with respect to the Ruth memorandum enclosed and set forth in Mr. Jaworski's book?

A No, there is not.

Q Is there any reference to the statement that President Ford read on the phone to General Haig?

A No, there is not.

Q Is there any reference at all to President Ford's speaking to General Haig?

A Yes, there is.

Q Can you identify that, please?

A Yes, on page 1 there is a reference to the previous conversation that one of the options was -- [594]

Q Why don't you read it into the record, Mr. Navasky, so I can just end this line of inquiry?

> A "Mr Ford testified that Haig told him White House staff members were considering half a dozen options with Mr. Nixon might follow and that one of them was that he might resign and be pardoned."

Q Is there any reference in the Washington Post article introduced in evidence to the fact that one of the things President Ford told Mr. Haig was that he should not draw any conclusions from his silence in the conversation they had had the day before?

A No, there is not. Let me

say, I could read another paragraph that refers to -- the paragraph after the one I just read goes into more detail about the Ford conversation with Haig in advance, that's all. But it doesn't relate to the questions you asked me.

Q Mr. Navasky, as you sit here today, is it your position that there is new material in The Nation article not previously disclosed before?

MR. ZISSU: I am going to object. The question is what is new in the Ford manuscript, not what's new in The Nation article.

MR. ABRAMS: That may be Mr. Zissu's question, but certainly one of the issues we will be briefing to [595] you, your Honor, in terms of both a fair use defense and first amendment

defenses, is what contribution The Nation article made.

THE COURT: Are you going to have him specify what is new?

MR. ABRAMS: Yes, sir. I am going to ask him as to specific passages, whether they are new or not.

THE COURT: All right, I will let you do it.

Q Would you put the article before you, Mr. Navasky?

A Yes. To answer your question, yes, it is my position that there is new material.

MR. ZISSU: Excuse me, your Honor. You mean new in the sense that it wasn't previously in the Ford manuscript?

MR. ABRAMS: I mean new in the sense of not previously being disclosed to the American public.

MR. ZISSU: But --

MR. ABRAMS: That is the sense in which I asked the question.

MR. ZISSU: Do you include that in the Ford manuscript, in that the manuscript was unpublished? [596] Everything is new before the manuscript is published.

MR. ABRAMS: Not everything is new in the manuscript, but there were some things that were.

Q Was the information set forth on page one of your article that but for a misunderstanding President Ford might have selected Ronald Reagan as his 1976 running mate, to your knowledge, today new information as of the time you published it in The Nation?

A Yes. [597]

Q Was the information that Washington lawyer Edward Bennett Williams was President Ford's choice for the head of CIA new information as of the time you published it?

A Yes.

Q Was the information that President Nixon was the one who first proposed Nelson Rockefeller for Vice President and that President Ford regretted his "cowardice" in allowing Rockefeller to remove himself from vice presidential contention new information as of the time it was published in The Nation?

A Yes.

Q I direct your attention now to page 2 of your article. In the first full paragraph now, is the information that "Although Ford said it would be

improper for him to make any recommendation," new information not previously disclosed?

A I am --

Q I'm sorry, that is the second paragraph. It's the first full paragraph, it starts with the words "although."

A See, I have the copy that says page 363, and I can't see --

Q Page 363, left column, the first heading is "Nixon." [598]

A Yes.

Q And then go down about twelve lines, with a line that starts in the middle of the word --

A I see.

Q My question is, the information that "Although Ford said it would

be improper for him to make any recommendation," in your view is that new information?

A Yes.

Q Going down further, is the information in the paragraph which begins "But because Ford had neglected to tell Haig," new information?

A Yes.

Q Going down further, is the information starting in the bottom paragraph, left column, with the words "Ford also discussed the matter with Jack Marsh" new information?

A Yes.

Q Turning to the right column, with respect to President Ford's conversation with General Haig, do you believe that the fact that President Ford read a written statement was new information?

A Yes.

Q Turning now to the bottom part of page 363, do you believe that all the information, starting with the words "Buchen, Haig, and Henry Kissinger agreed with [599] him" through the bottom of the page, is new information?

A Yes.

Q On the next page, do you believe that the entire page contains new information?

A Yes, with the exception of the item on the decision to run again.

Q What about that do you believe was not new information?

A Well, I think Ford had talked about that before, but I felt it was newsworthy because he was -- it contradicted his circumstances in '79 -- his potential candidacy in '79.

Q Do you believe the material under the heading "On Nixon's Character" was new information?

A Yes.

Q Mr. Navasky, does the fact that The Nation article contains material about the pardon which had been previously disclosed in the Hungate Committee hearings change your view as to the newsworthiness of the article as a whole?

A No, I think that things can be newsworthy even though they are not new.

Q Why it that?

A Because changed political contexts bring public [600] events to public attention anew, and when a former president of the United States puts them on the public agenda with his own --

based on his own experience, that serves them up in what I would regard as a newsworthy way. As I mentioned the other day, Walter Lippman said news is what public officials say it is. I thought this was a case in point.

Q Do you think that today?

A Yes, I do.

Q Mr. Zissu asked you some questions earlier with respect to the publication of an advertisement in the April 7, 1979 issue of The Nation. Have you now been shown the letter to which you referred in your testimony?

A Yes, I have.

Q I put before you, Mr. Navasky, Defendants' Exhibit QQ for identification and ask you whether that is the letter pursuant to which the agreement

was reached to publish a supplement in the April 7th issue of The Nation.

A Yes.

Q Did the fact that there was going to be a supplement in the April 7th issue have anything whatsoever to do with your decision to publish the article on the Ford memoirs? [601]

A Nothing whatsoever.

Q You mentioned yesterday that you had taken certain action at the time and since the time you have been the editor of The Nation. Did one of them relate to the cover of the Nation?

A. Yes.

Q What was that?

A We made one major format change, which was to change the cover of The Nation from a conventional display

cover to a cover that has typography on it, type, so that the stories start on the cover. We did that because we wanted the magazine to appear to be what it is, which is a serious journal of news and opinion.

MR. ABRAMS: I move the admission of Defendants' Exhibit QQ, your Honor.

MR. ZISSU: No objection.

(Defendants' Exhibit QQ was received in evidence.)

MR. ABRAMS: I have no further questions, your Honor.

RECROSS EXAMINATION

BY MR. ZISSU:

Q Mr. Navasky, is it your testimony today that the press generally did not cover in October of 1974 [602] President Ford's telephone call to General

Haig on August 2, 1974 in which President Ford said to Haig in effect that there would be no deal on the pardon?

A Some of the press covered it. None of them said it was a written statement made --

Q Please try to answer the question.

A I'm sorry.

Q The written statement -- we know about your argument. Everybody knows about it. Is it your testimony that the press generally did not cover in October 1974 the fact that President Ford made that telephone call?

A Some of the press did and some didn't.

Q Are you familiar with what the press did or didn't? Have you gone back

and looked at anything beside those two articles overnight?

A I have read all of the clippings that were in my attorney's office, in addition to these two articles. But I did not do an independent search of my own.

Q Some of the press did cover it?

A That's right.

Q Which of the press covered it?

A Well, The New York Times covered it on the jump in the way that I read. [603]

Q We follow your argument about the jump. I asked you which articles that you saw last night covered this.

A I saw none -- I saw The New York Times.

Q How many articles did you look at?

A Well, we had a big folder of -- I am now putting together the story about our -- which you don't want me to talk about, I am putting together the story about The Nation's story and what happened before, so I would say a half dozen, I don't know.

Q A half dozen what?

A Articles. But I would --

Q You looked at a half dozen?

A I would say so.

Q And on that basis you testify that some of the press did cover it and some did not?

A Primarily on the basis of your exhibits. I testified to that. [604]

Q So you are not able to say on

the basis of six articles, are you, that it was not covered?

A That "it" being the telephone discussion?

Q Right.

A That's right.

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[Portions of Plaintiffs' Exhibit 6]

[532]

AGREEMENT made this 28th day of February, 1977 by and between

PRESIDENT GERALD R. FORD

c/o The William Morris Agency, Inc., of 1350 Avenue of the Americas, New York, New York 10019 (hereinafter "Author") and HARPER & ROW PUBLISHERS, INC., of 10 East 53 Street, New York, New York 10022 (hereinafter "H&R") and THE READER'S DIGEST ASSOCIATION, INC., of New Castle, New York (hereinafter "RDA") (hereinafter collectively "Publisher") with respect to a presently Untitled Memoir by President Ford (hereinafter "the Work") the subject and nature of which is described in a letter dated February 22, 1977 addressed to The

William Morris Agency, Inc. by H&R, such letter being attached hereto as "Exhibit A".

WHEREAS, H&R and RDA have entered a co-publishing agreement under the terms of which H&R and RDA will co-publish the Work;

NOW, THEREFORE, in consideration of the promises set forth the parties hereto agree as follows:

1. PUBLISHER'S OBLIGATION: Publisher shall perform all of its obligations contained in this Agreement and conduct all of its transactions pursuant to this Agreement in a manner consistent with and with all due respect to the position of the Author as a world figure of international renown. Without limiting the generality of the foregoing,

Publisher shall publish its edition of the Work, conduct all of its advertising and promotion of its publication of the Work, and conduct the disposition of subsidiary rights granted to it hereunder in the manner described in the preceding sentence.

2. AUTHOR'S GRANT: Author grants to Publisher the sole and exclusive right to publish and sell the Work in book form in the English language and the sole and exclusive right to exercise, sell, license or otherwise dispose of any or all of the subsidiary rights thereto defined in Paragraph 10 hereof throughout the United States, its territories and [533] dependencies, the Philippine Islands and Canada, and the non-exclusive right to exercise the

rights granted by Author to Publisher hereunder throughout the rest of the world, with the exception of the British Commonwealth (excluding Canada) (hereinafter "the Territory") for the full term of copyright and any and all renewals and extensions thereof now or hereafter available in each country included in the Territory.

* * *

[551]

20. RESERVATION OF RIGHTS: All rights not specifically granted to Publisher herein are reserved by Author subject to the provisions of subparagraph 8(d) hereof and the provisions of this Paragraph.

(a) Without limiting the generality of the foregoing, Author

agrees that in making any disposition of motion picture rights, television rights or any other subsidiary rights to the Work, he will specifically reserve all publication rights to the Work with the exceptions of the right to publish but not to sell 7,500 words from the Work and the right to publish but not to sell excerpts, synopses, or summaries of the motion picture or television versions of the Work which do not exceed 7,500 words in length for advertising and promoting the motion picture or television versions of the Work provided that excerpts from the published version of the Work shall contain the appropriate copyright notice.

(b) Author acknowledges that the value of the rights granted to Publisher hereunder would be substantially diminished by Author's public discussion of the unique information not previously disclosed about Author's career and personal life which will be included in the Work, and Author agrees that Author will endeavor not to disseminate any such information in any media, including television, radio and newspaper and magazine interviews prior to the first publication of the Work hereunder. Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision.

* * *

[557]

EXHIBIT A February 22, 1977

5.

A. PRESIDENT FORD'S BOOK

The authors -- Gerald Ford and Trevor Armbrister -- propose a manuscript of approximately 150,000-175,000 words, the major portion of which will describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about

(1) Mr. Ford's relationship with former president Nixon, including Mr. Nixon's reactions to the crisis arising from the

Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and (3) Mr. Ford's reflections on this period of history, and the morality and personalities involved.

While it is understood that Mr. Ford's pre-presidential years will be a part of this book, the finished product need not be an orthodox autobiography.

Mr. Armbrister will have access to all pertinent documents, where available; and in researching the book he will interview Mr. Ford's principal aides and other relevant sources for information concerning the Ford administration.

The final manuscript will present

as candid and honest an account as possible of the main period covered in order to preserve the record for history; but at the same time it is to be a warm, human document heavy with anecdoctal material.

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[Deposition of Gerald R. Ford]

[10]

Q Do you recall if you were told that Time offered to publish portions of your memoirs a week before the originally scheduled date for publication?

A No, sir.

Q Is this the first time, to your knowledge, that [11] that information has ever been given to you?

A I subsequently learned it some time thereafter, but significantly after the time sequence we are talking about.

Q Can you place at all in time how long after the events we are talking about that you learned that?

A Not --

Q Months afterward?

A Yes.

* * *

* * *

[15]

Q If I can ask you to look again at the agreement you reached with Harper & Row and Reader's Digest, and direct your attention, please, to paragraph 20 (B), which is on page 20, the language therein states, "Author acknowledges that the value of the rights granted to publisher hereunder would be substantially diminished by author's public discussion of the unique information not previously disclosed about author's career and personal life which would be included in the work, and author agrees that author will endeavor not to disseminate such information in any media, including television, radio and newspaper and magazine interviews prior to

[16] the first publication of the work hereunder."

There is an additional sentence which I am not reading into the record.

A May I read that?

Q Surely.

A The following sentence is, quote: "Spontaneous and brief statements by author in response to reporters shall not be considered a breach of the foregoing provision."

Q My question is, prior to publication of the book did any situations develop in which as a result of paragraph 20 (B) you were obliged to decline to be interviewed or to otherwise furnish information with respect to the pardon of President Nixon?

A After leaving the White House I was interviewed many times for radio, television and otherwise, and on many occasions when I would visit, for example, a college or university campus and would be asked questions by students and faculty, I would frequently be asked questions about the pardon.

My answer, repeatedly, was a repetition primarily of what I testified to before the Subcommittee of the House Committee on the Judiciary under Congressman Hungate. I stuck to the record, which was laid out very completely there, because I felt that was the public record, and that is what I [17] ought to use in responding to any questions from press or other.

Q Prior to publication were you

asked to appear on NBC television to discuss the pardon of President Nixon?

A They never asked me directly, to my best recollection. There was some discussion, which was primarily conducted through Dean Burch, as to whether I would appear, but there was a contractual, as I recall, agreement as to when I would disclose any additional information involving the pardon over and above what I testified to, such additional information being my subjective feelings, my personal discussions with my wife and others.

Q Was the agreement that you have just spoken about an agreement between you and NBC or an agreement between you, Harper & Row and Reader's Digest?

A I don't recall. I believe it was an agreement between myself and NBC, but I cannot tell you technically whether that is correct or not.

It was an agreement that I understood in one way or another.

Q Did you understand that you were precluded to any degree by your contract with Harper & Row and The Reader's Digest from disclosing, prior to publication of the book, any information with respect to the pardon of President Nixon [18] relating to your conversations with then General Haig?

A My agreement with Harper & Row was that I should relate on a broader basis my subjective feelings or any things different from what I had testified to before the House Committee on the Judiciary.

Q Is that what your book did?

A That is what my book did add over and above the testimony: the more intimate, the more personal, the more subjective personal feelings that went through my mind from the time that the pardon became a possibility from my point of view.

Q Apart from adding your intimate feelings, reactions and the like with respect to the pardon, did the book add anything with respect to your testimony before the House Committee regarding the facts relating to the pardon itself?

A The factual presentation was made to the House Committee. The book took those facts and added my personal reactions, experiences, et cetera.

Q In addition to adding your personal experiences, feelings and the like, did the book, to your recollection, add any facts with respect to the pardon?

A Not on my decision. The book might have added some facts as to conversations with my wife or perhaps with [19] others.

Q Did it add anything with respect to conversations with General Haig, for example?

A I believe the testimony before the committee and the facts in the book, as far as Haig are concerned -- the facts, now -- are identical.

Q Did it add anything with respect to conversations with other public officials that was not contained in

your testimony before the Hungate Committee?

A There were no additional facts as to the pardon itself. There may have been additional information as to the time of meetings with other public officials, discussions of my feelings at the time, but the facts in both cases are identical. The embellishment is primarily my feelings, or conversations that might have taken place that were not related to the facts themselves of the pardon.

Q Are the conversations to which you have just referred with Mrs. Ford or intimates of yours?

A Right.

Q Do I understand you correctly that you distinguish that from

conversations with public officials in the sense that I just asked you?

A Obviously the book shows I had conversations with Robert Hartmann, Jack Marsh. Harlow, of course, was not a [20] public official at the time, but Marsh and Hartmann were.

Q Had the facts relating to your discussion with Mr. Hartmann and Mr. Marsh previously been disclosed to the House Committee?

A I have not reviewed that testimony. Those conversations may or may not have been in the testimony. I cannot with certainty tell you whether they were a part of my testimony or not.

Q Would your testimony be the same with respect to conversations with Mr. Harlow?

A Yes, I think so.

Q That is, as you sit here today that you cannot recollect for us precisely what was in the testimony?

A I can't recall precisely whether in the testimony before the House Committee I referred to any conversations I had with Hartmann, Marsh or Harlow. Watever the record shows would be the fact.

Q I want to return now to the questions I was asking you a few moments ago about discussions with NBC with respect to an appearance by you with respect to the pardon of former President Nixon.

I would like to read to you a portion of three news columns, and then ask you if they refresh your recollection as to these matters.

* * *

[21]

Q In the first paragraph of the story in the [22] Philadelphia News of November 25, 1977 it states that

> "There is a strong possibility that former President Gerald Ford's first special on NBC, which had been scheduled for December 21, will be postponed because of a legal conflict involving the publisher of his forthcoming memoirs. The publisher, Harper & Row, has made no effort to halt the program. However, it has informed NBC that under its contract with Ford he must not discuss his pardoning of former President Richard Nixon until after the account is published by Harper & Row. Ford's memoirs will not be published until sometime in 1979."

Then, referring to paragraph 4 it says,

> "Undoubtedly, the highlight of the hour would be Ford's explanation of the Nixon pardon. Now that that use of this material is doubtful, NBC is reviewing the matter of program content and possible postponement of the premiere."

Does this refresh your recollection, President Ford, as to whether in 1977 as a result of your contract with Harper & Row a decision was reached that you would not appear on NBC television for the purpose of discussing the pardon of President Nixon?

A I never had any personal discussions with the people from NBC on this matter. It was my custom whenever there was any discussion of the several contracts to refer them to Dean Burch for his interpretation and for his [23] resolution.

Q Do you recall discussing with Mr. Burch whether you could appear on NBC and discuss the pardon, at some point in 1977?

A I am certain in our

discussions as he explained the several contracts to me that the matter came up, but the negotiations with NBC, Harper & Row were always conducted directly by him.

Q Do you have any personal recollection as to reaching a decision based on Mr. Burch's advice not to appear on television to discuss the pardon prior to publication of the book?

A Repeat that again, please.

MR. ABRAMS: Mr. Reporter, please. (The record was read.)

A The fact that I did not is the best evidence that I made such a decision.

Q And it is a fact that you did not appear --

A Not to discuss the pardon

beyond the testimony of what I had previously given to the House Committee.

Q That was because of your agreement with Harper & Row?

A Correct.

Q Directing your attention now, President Ford, to [24] Defendants' (Ford) Exhibit 5 for identification, which is the December 19, 1977 article from the Philadelphia Daily News, I would ask you to direct your attention, please, to the fifth paragraph in the first column, which starts with your name, and then the first paragraph in the next column.

A Correct.

Q Those two paragraphs state,

"Gerald Ford was being paid $1.3 million for five NBC news specials, had his long-awaited debut postponed twice. The reason turned out

to be that he also had an exclusive deal with Harper & Row to publish his memoirs that prevented him from discussing the presidency. A new deal had to be renegotiated between the network and the former president which calls for his first special to air in 1978. The subject will be foreign policy, a subject certainly that could have influence on the electorate if he decided to run for office in 1980."

Was your debut on NBC postponed twice as a result of your agreement with Harper & Row?

A There was some delay. I cannot tell you whether it was postponed twice or not. I eventually did appear with John Chancellor on a foreign policy discussion, and I don't recall the date.

Q Did you appear at all with respect to the pardon, prior to publication of the book? [25]

A Not on the pardon specifically.

MR. ZISSU: You are asking

about NBC?

MR. ABRAMS: Yes.

A (Continuing) Not specifically. Part of the agreement also provided that at various times I would do a news special, which I did, over a period of three or four years. I don't recall whether on any of those particular news pieces that I ever discussed the pardon.

Q Do you believe that you did?

A Certainly not beyond any of the testimony that I gave to the Committee.

* * *

[28]

Q I would like to pass to you now and have you reread to yourself the article in The Nation which leads to this deposition today. It is a few

pages long, and I would propose we take a 10-minute break to give you a chance to read the whole thing.

[29]

Let me mark it first as Defendants' (Ford) Exhibit 7.

(Article referred to marked Defendants' (Ford) Exhibit 7 for identification, this date.)

(A recess was taken.)

Q President Ford, when to your recollection is the last time before right now that you looked at The Nation article of April 7, 1979?

A My best recollection is that I read it at the time it was published, a copy was sent to me, and that would be on or about April 7, 1979.

Q And you now have reread it at my request?

A I have.

Q You testified earlier that your memoirs added to the public record with respect to your subjective feelings with respect to the pardon of President Nixon. Are any of those subjective feelings reflected in The Nation article which has been marked as Exhibit 7?

A No, but I am struck with a sentence in the fourth paragraph in the article, which reads as follows: "Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it."

I think the subjective feelings that I expressed [30] in the book would fall under the heading of that sentence.

Q Is there anything in The Nation article which sets forth your subjective feelings?

* * *

[31]

A Will you repeat the question, please.

Q Yes, sir. The question is whether the article published by The Nation under the date of April 7, 1979 sets forth any of your subjective feelings with respect to the pardon of President Nixon.

* * *

[32]

A If I might take one as an illustration, on page 363 of the exhibit, the third paragraph down, there is a sentence in the article which reads

as follows: "Rather, he did it because he had 'to get the monkey off my back one way or the other.'"

That certainly is a reflection of a subjective feeling, and it, to my best recollection, was not in my testimony, in those words, at least, before the House Committee on the Judiciary.

That is one illustration.

Q Is there anything else?

A I notice one error in the article. On page 363 the article says, "Jackson, Michigan." It was Jackson, [33] Mississippi.

Again on page 363, the first paragraph -- it follows the quote from the Ruth memorandum, the article says, "Ford decided that court proceedings against Nixon might take six years, that

Nixon 'would not spend time quietly in San Clemente,' and 'It would be virtually impossible for me to direct public attention on anything else.'"

That was the subjective feeling I has as to what might transpire over the six-year time span.

Those are several illustrations.

Q Let me pause on that one. To the best of your recollection, was the disclosure in your memoirs that you believed Mr. Nixon "would not spend time quietly in San Clemente" and that "It would be virtually impossible for me to direct public attention on anything else" made for the first time anywhere in the memoirs?

A Phrased as such, yes.

Q Had you previously, to the best of your recollection, publicly stated in words or substance that one reason for your pardon of President Nixon was that if you had not pardoned him public attention would have been over-focused on President Nixon's potential criminal charges?

A The principal public reason I gave on more than one occasion was that I had a full-time job with our then [34] current domestic and foreign policy problems and that the time that I was being asked to devote to listening to lawyers arguing about what I ought to do with the tapes, and so forth, was preempting too much time, and that in order to do my job as president for the country as a whole I should not be

diverted with this kind of time consumption.

That was the principal reason for my decision to give the pardon. It was the only way I could clear the decks and devote my full time and attention to the public business.

Q And that reason or those reasons had previously been disclosed, had they not?

A Oh, I have said that from the very beginning.

Q You read earlier, President Ford, from the first page of The Nation article in question the line which says that your account of the Nixon pardon "contains significant new detail on the negotiations and considerations that surrounded it."

Do you think it was an accurate statement to say that your account did contain significant new details on the negotiations?

A Not on the negotiations, no; on the considerations primarily the subjective considerations, yes.

* * *

[49]

EXAMINATION BY MR. ZISSU:

Q Mr. President, I am going to direct your attention to certain portions of Defendants' Exhibit 7 for identification to this examination, which is The Nation article, and I would ask that a copy be made available to you, if possible.

[50]

A I gave my copy back to somebody.

MR. ZISSU: Does somebody have the marked one that is the official one to this deposition?

(Discussion off the record.)

Q There was some questioning by Mr. Abrams as to what aspects of that article reflected your personal feelings with respect to the pardoning, and personal reactions, and you gave him some aspects, as I think you termed it, "illustrative."

Now I want to direct your attention to certain other portions of that article and ask you whether these are also illustrative.

On the first page of the article, at the bottom of the last line of that article, there is a phraseology "Ford was deeply hurt by Haig's" -- and

then it continues on to page 363 -- "revelation."

Is that a portion of the article that reflects your subjective feeling in relation to the events relating to the pardon?

A Yes. It was a personal reaction. I was deeply hurt by the fact that Nixon had repeatedly assured me that he was not involved in Watergate and that the evidence would prove his innocence.

Q And there is further, continuing the statement, [51] "Ford had believed him . . ."

Is that similarly a reflection of your personal feelings?

A I had believed Mr. Nixon because of his repeated assertions, yes.

Q Continuing into the next paragraph there is the statement in the middle of the paragraph, "Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment . . ."

Is the statement as to what you considered improper and what you basically agreed with also a reflection of your personal reactions?

A It certainly was a personal reaction that it would be improper for me to make any recommendation.

Q In the next column on page 363, at the end of the second paragraph there is a quote, "'Had I said otherwise at that moment,' he writes, 'the whole house of cards might have collapsed.'"

Is that also reflective of

your personal feelings with relation to the events leading to the pardon?

A Well, that particular statement related to what I felt when I was attending a press conference in Jackson, Mississippi. That was a personal feeling at the time that I could not change my public statements even though I had some [52] information given to me by Mr. Haig that the situation might be different than it had been previously.

Q And in the next paragraph there is a quotation from your manuscript about having "compassion for Nixon as an individual" and the fact that that had not prompted your decision at all.

Is that also reflective of your personal feelings and reactions to the events?

A Yes, sir.

Q In the next paragraph there is a quoting of the word "crucial" as to certain information and reasoning of, I guess it is Mr. Jaworski or Mr. Ruth.

Is that also reflective of your personal feelings?

A Correct.

Q Continuing down into the language about your statement that "Nixon would not spend time quietly in San Clemente . . . It would be virtually impossible for me to direct public attention on anything else," is that also reflective of your personal feelings with respect to the facts?

A That is, and I think I used that as an illustration when I responded to Mr. Abrams.

Q I made a mistake in including that one.

Continuing further, in the third paragraph from [53] the bottom of that page, in the last line there is a statement ". . . but Ford was reluctant to do that."

Is that also indicative of your personal reactions and feelings relating to the events leading up to the pardon?

A Yes, I believe so.

Q And continuing on the next page, and please correct me if I missed this one, at the beginning of the page at the top there is reference to "the President's ability to discuss Watergate objectively was almost nonexistent."

Is that indicative of

something that was a personal impression or to which you had a personal reaction with respect to Mr. Nixon?

MR. ABRAMS: I object to the form of the question on the grounds that it is incomprehensible.

Q Let me direct your attention to the entire quote: "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Does the inclusion of that statement in your book have anything to do with your personal reaction to the events leading up to the pardon?

A Well, it certainly was indicative of the mental condition of Mr. Nixon, and subjectively that probably

had some impact on my decision, although, as I have said [54] repeatedly, publicly as well as here today, the primary basis for my decision was one of public policy.

Q And continuing further, below the paragraph referring to Yale Law School, in the next paragraph there is a statement, "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion."

Is that also indicative of your personal feelings in relation to the pardon?

A Of course, that was after the fact. That was probably a month after the decision by me to grant the pardon. That was definitely a subjective

expression on my part as to why I should or should not stop in the hospital and see Mr. Nixon.

Q Finally, on the discussion of Nixon's character, does your description towards the end of this article at the bottom of page 364 about Nixon's character reflect anything in relation to the pardon, in terms of your feelings?

A Subjectively, yes.

Q Could that similarly be said of the description of how Mr. Nixon appeared "stretched out flat on his back," et cetera, even though that visit to the hospital to him took place after the pardon?

MR ABRAMS: I object to the form of the question.

[55]

A There is no doubt in my mind as I saw Mr. Nixon on the hospital bed -- and I never saw anybody closer to death than he at that time -- that that was a subjective reaction that after the fact to an extent justified my decision.

Q Finally on this subject, on the last page of the article, page 365, there are statements about your having wondered whether Nixon had known in advance about Watergate, and a comment on Nixon's state of mind at the time of his resignation.

Are those statements also reflective of your personal feelings towards the events?

A Are you referring to the quotation, "Nixon was out of touch with reality"?

Q Yes.

A Very definitely. That was a reaction that I had as my wife and myself listened to his television speech announcing that he was resigning the next day.

* * *

[56]

EXAMINATION BY MR ABRAMS:

Q President Ford, do you believe that the question of why you pardoned President Nixon is a matter of public significance?

A Yes, and that is why I testified before the House Committee on the Judiciary, voluntarily.

Q Do you believe that your state of mind at the time you pardoned President Nixon is a matter of public significance?

A No. I think the factual justification was a matter of public significance but the internal workings of my mind, the subjective things that took place over that period of time, I do not think that qualifies in the same way as the factual recounting of what took place.

Q Are the reasons that you pardoned Nixon matters of public significance?

A The reasons that I gave to the House Committee were important information, and that is what I set forth [57] before the House Committee on the Judiciary.

Q Let me take an example from Mr. Zissu's recent questions to you, page 363 of The Nation article. You

said in your manuscript, and The Nation quotes in its article in paragraph 2 on the second column of page 363, that had you said otherwise at the time you were speaking at a Jackson, Mississippi luncheon audience, "the whole house of cards might have collapsed."

Is it your view that that is a matter of private property interest of yours?

MR. MILLER: I am going to object to the form of the question.

MR. ZISSU: I object to the form of the question.

MR. MILLER: Also as to its relevance.

Q As you sit here today, President Ford, do you believe that your belief at the time you spoke in Jackson,

Mississippi, that had you said anything other than what you then said, "the whole house of cards might have collapsed," is a matter of public interest?

A I think you have to relate that statement by myself which was quoted to the situation as it existed on August 3, 1974. Prior to that time I had been told, and I believed, that Mr. Nixon did not know of the Watergate [58] prior to its being carried out. I had been told the morning of or during the day of August 3 that there might be some additional evidence, but I had not heard it myself. It was a very tense time in our history, and for me to publicly make statements based on this allegedly new information would potentially have created an additional crisis.

And since I had not personally heard the so-called "new evidence," I did not feel that I would be acting properly to make any statement at that time different from what I had been saying previously.

Q Had you told the American public at any point prior to the publication of your manuscript what you have just told us now?

A Repeat that again.

Q Had you told the American public, in any form, prior to the time your manuscript was published of the information that you have just told us in the last three or four sentences of your last answer?

A No.

Q Why not?

A Because of the tenseness of the situation that existed from August 1 when I was first told what might be revealed publicly with the tape of June 23. That was very devastating evidence, according to the people that told me, [59] and until I had heard myself or had read a transcript of it, it would have been, I think, unwise for me to take any position different from the one that I had taken for a number of months.

Q Is there any reason that subsequent to the resignation of President Nixon and prior to your publication of your manuscript that you did not disclose that information to the public?

A First, nobody asked me.

Q Nobody asked you what you were -- I'm sorry --

A Nobody asked me that precise question. But in the writing of the book it was a part of the sequence that took place from August 1 until August 9, and it seemed a proper thing to include in the book as an explanation of why I did not say anything, even though I had this alleged information that had been given me on August 1.

Q Now, the alleged information is that which Haig told you; is that correct?

A That is right.

Q Do you think it is appropriate for historians to pass judgment on the conduct of presidents within five years of their leaving office?

A We have people passing judgment on the performance of presidents on a daily basis.

[60]

Q Would it have been useful, do you think, for individuals passing judgment on your performance as president to have had the information that you provided in your book with respect to the pardon?

A You mean from the date of the pardon up until the time the book was written?

Q Yes, sir.

A I think it was important to them to have what I wrote in the book, based on my thoughtful preparation in the book, yes.

Q Would it have been important for them to have had it earlier?

A Not necessarily my subjective feelings, no. They had on the record

the factual presentation, but the subjective feelings I had in the period of time I think could best be made available for history by the writing of the book.

Q A final question or two, President Ford.

If you would direct your attention to page 363 of The Nation article to the material three paragraphs up from the bottom. You were asked by Mr. Zissu whether it was one of your impressions or subjective reactions that you were "reluctant" to "condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant [61] to various Watergate proceedings . . ."; is that correct, sir?

A To a degree, but I reiterate what I have said many times publicly and restated here: that the basic reason I gave the pardon was for public policy reasons. This might well have been a subjective reaction.

Q Do you believe that your reluctance to condition the pardon in the fashion that Mr. Buchen had urged upon you was a matter of public interest?

A The public interest was the basic reason I gave the pardon, and all the subjective decisions might have bolstered it, but the basic reason was that I needed a hundred percent of my time on public matters, domestic and foreign, and that as much as 25 percent of my time many days during that period was

spent listening to lawyers arguing the pros and cons as to what to do with the tapes and documents and so forth, and I finally decided that the country needed a hundred percent of my time on the public business and not 25 percent of my time on Mr. Nixon's problem.

Q A final question: Do you believe that the fact that President Nixon misled you as to the facts of the Watergate matters was a matter of public significance?

A If my recollection is correct, I so testified before the House Committee.

Q Was the fact that you had believed President [62] Nixon at the time he made those statements to you also a matter of public interest?

A I believe either directly or otherwise I so stated in my testimony.

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[Portions of Defendants' Exhibit A]

[1218]

For Immediate Release

HARPER & ROW AND THE READER'S DIGEST
COPUBLISH GERALD FORD'S AUTOBIOGRAPHY

Gerald R. Ford's autobiography, A Time to Heal, is at once the chronicle of a remarkable political career and the human story of a dedicated but unassuming man propelled by history into taking on the immense burdens of the presidency. Recounting his life, from modest Midwestern beginnings to the White House, Gerald Ford provides a basis for our understanding of the man, his origins, his values and his assumptions about the nature of American social and political life.

At the outset of A Time to Heal

(Harper & Row/Reader's Digest, $12.95, June 6, 1979), Mr. Ford describes one of the most trying times in our nation's history, the tense, crucial days when he -- and the country -- waited for President Nixon to step down from office. What really happened behind the scenes? What nerve-wracking, challenging meetings were there with White House aides, the Congress, the press, his own family? Gerald Ford answers these questions fully, openly and fairly. From General Alexander Haig's first telephone call to the oath-taking ceremony eight days later, a cascade of events, many of them revelations, rush across the pages of Mr. Ford's book. Readers will learn for the first time his thoughts about these

events; his assessments of Nixon, Haig and others; his vivid description of Nixon's last Cabinet meeting; his detailed explanation of how the Ford team managed a smooth transfer of the reins of government.

Michigan Football and Yale Law

Gerald Ford assumed the presidency under extraordinary circumstances. That he was equal to the task he credits to his upbringing. He writes warmly of his mother and stepfather, and of the values they instilled in him. He was shaped by their honest virtues, and by a strong sense of competition that his early life drilled into him. There were highs -- he was a football hero at Michigan, good enough to receive professional offers; and unexpected blows -- the

disheartening meeting with his real father. And it took all his persistence to get into Yale Law School and maintain good marks while holding down a full-time job. [1220]

His budding law career was cut short by Pearl Harbor and four years in the Navy, including combat at sea. After the war he returned to the law and soon became interested in politics. In 1948 he won election to Congress from Michigan's Fifth District. By then, he writes, "I had pretty well formed the political philosophy I've maintained ever since. On economic policy, I was conservative -- and very proud of it. I didn't believe that we could solve problems simply by throwing money at them. On social issues, I was a moderate; on questions of foreign policy, a liberal."

With his new bride, Betty, he headed for Washington and what would prove to be twenty-five years as a Congressman. Mr. Ford's rise to the position of Minority Leader, as he tells it, is a fascinating sketch of what day-to-day politics is all about.

A Trying Vice Presidency

Nixon and his aides never understood how to deal with Congress, writes Ford, "and it developed into one of the worst failings of his Administration." Ford was convinced that Nixon nominated him as Vice President, after Agnew's resignation, "because he wanted to pick someone who could help repair his frayed relations with Capitol Hill and the media." Afterwards he learned that he was actually fourth on Nixon's list.

His time as Vice President was a trying one for Ford. He tells how he was used by Nixon speech writers and hampered by Nixon staffers. But the big problem, of course, was Watergate. "I was in an impossible situation," he writes. "I couldn't abandon Nixon, because that would make it appear that I was trying to position myself to become President. Nor could I get too close to him, because if I did, I'd risk being sucked into the whirlpool myself. It was a day-by-day balancing act and I detested the whole thing."

Pardoning a President

One of the first controversial acts of Ford's presidency was his selection of a Vice President. He tells in detail what he felt was needed in a candidate

and how he came to choose Nelson Rockefeller. But the biggest controversy of Ford's presidency would concern his pardon of Richard Nixon. Characteristically, he leads into the subject by revealing how his own attitude caused him to misread the public mood. [1221]

He was looking forward to his first press conference, anticipating questions on the economy, staff reorganization and foreign policy. His aides warned that the press was interested only in Nixon. "There were too many other things of vital importance to the country at home and abroad, and I was sure reporters would ask about them." Then he adds: "I was totally wrong." Everyone was interested in only one issue, and for the next ten days it was the issue he would agonize over.

"I simply was not convinced," he writes, "that the country wanted to see an ex-President behind bars. We are not a vengeful people; forgiveness is one of the roots of the American tradition. And Nixon, in my opinion, had already suffered enormously. His resignation was an implicit admission of guilt, and he would have to carry forever the burden of his disgrace. But I wasn't motivated primarily by sympathy for his plight or by concern over the state of his health. It was the state of the country's health at home and around the world that worried me."

His discussion of all the ramifications of a pardon -- as opposed to "the spectacle of a former President on trial" -- reveals how thoroughly Ford

explored the issue. There was the question of determining his legal authority to offer a pardon before an indictment; the legal opinion that it was better to act early rather than late; a painful scene between Nixon and a Ford aide attempting to get a statement from the former President; the weighing of pros and cons, and the arguments against a pardon; questions of timing, and the effect of a pardon on the trials of Watergate defendants; and politics, in particular the upcoming Congressional elections. "I concluded," Ford says, "that the national interest overrode any political considerations. That was the easiest objection to confront."

In the end he granted the pardon. "Years before," he writes, "at Yale Law

School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible." When it was done, "it was an unbelievable lifting of a burden from my shoulders. I felt very certain that I had made the right decision, and I was confident that I could now proceed without being harrassed by Nixon or his problems any more." And he adds: "It didn't take me long, however, to discover I was wrong." [1222]

Problems at Home and Abroad

His reactions to World leaders display his instinctive warmth, even when he recognizes in them ideological foes.

He writes at length of his meetings with Brezhnev and Mao, and his hard wrangling to improve the chances for peace while maintaining national security. At times his wrangles with Congress seem more formidable. Ford writes about them from a unique perspective, having been himself a Congressman for so long. And his criticism of their actions, especially on foreign policy and excessive spending, is often bitingly blunt.

One of the most dramatic moments of Ford's presidency came when the Mayaquez was seized by the Cambodians. He recounts the incident in full, revealing the role played by White House photographer David Kennerly. And he also reveals Defense Department bumbling and raises some questions that even now

remain unanswered. Two more moments of drama came in California, fifteen days apart, when attempts were made to assassinate him.

Ford is especially candid about his relations with staff members and his Cabinet, most particularly his run-ins with Defense Secretary James Schlesinger. "My first brush with Schlesinger had occurred in March 1974," he writes, "when I was Vice President. . . Our personal relationship, which had never been good, slid downhill after I became President." Ford tells how he "had to admonish Schlesinger about newspaper stories suggesting that he had put our armed forces on alert just prior to Nixon's resignation." For the sake of continuity in United States

policy, he kept Schlesinger on. "Had I not felt that way, I would have found a new Secretary of Defense as quickly as possible." Months later, when he learned exactly how the incident had occurred, Ford concluded that "I had been remiss in not getting rid of him;" there was no alternative.

"Schlesinger's peculiar behavior was only one of several reasons why he would have to go. . . Somehow Schlesinger had succeeded in projecting the public image of a hawk. . . In reality, the reverse was true. His views often were more dovish than mine. He was obviously unsuccessful in dealing with Congress, and his rivalry with Kissinger was making me increasingly uncomfortable. But I must also admit that his aloof,

frequently arrogant manner put me off. I never could be sure he was leveling with me." [1223]

The Campaign Trail

As a Presidential candidate Ford had "all the liabilities of an incumbent President -- and few advantages." He had to build a political organization from scratch; he had antagonized special interest groups; and he had used the veto frequently. Above all he underestimated Reagan's bid until almost too late. His campaign against Reagan for the Republican nomination becomes a cliff-hanger in the retelling. Ford is, as ever, straightforward in detailing his campaign flubs and triumphs. He discusses how and why he picked Dole as his running mate, his campaign strategy,

what he thought of Carter as a campaigner (who "played fast and loose with the facts"), his disappointment in Reagan's not campaigning for him, and his stubborness about admitting his Eastern European gaffe during the second debate.

A Nation Healed

Ford expressed his vision of this nation most eloquently on July 4, 1976, the nation's two-hundredth birthday: "In the space of two centuries, we have not been able to right every wrong, to correct every injustice, to reach every worthy goal. But for two hundred years we have tried and we will continue to strive to make the lives of individual men and women in this country and on this earth better lives -- more hopeful

and happy, more prosperous and peaceful, more fulfilling and more free. This is our common dedication and it will be our common glory as we enter the third century of the American adventure."

Reflecting on that memorable day, he remarks: "Not a single incident marred our festival. The nation's wounds had healed. We had regained our pride and rediscovered our faith and, in doing so, we had laid the foundation for a future that had to be filled with hope." President Ford's role in the healing process, in preparing the foundation for a hopeful future, has not gone unrecognized. In fact, after taking the oath of office, President Carter's first words were: "For myself and for our nation I want to thank my

predecessor for all he has done to heal our land." A Time to Heal is Mr. Ford's own account of all that he did.

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[Caption omitted]

ADDENDA TO DEFENDANTS' POST-TRIAL MEMORANDUM OF LAW

To facilitate the application of the legal principles set forth in the defendants' memorandum of law, the defendants have prepared three aids for the Court: (1) a written analysis of each sentence of the article setting forth separately as to each whether any copyrightable material can possibly be said to be involved along with a color-coded analysis of The Nation article illustrating the application of the sentence-by-sentence analysis; (2) a comparison of the article with the manuscript (defendants' version of Plaintiffs' Exhibit 11) [contained in the Appendices to the Petition for

Certiorari ("Pet.") as Appendix E at E-1], attached as Addendum B; [and] (3) a comparison of the Hungate Committee testimony of former President Ford (Deft.Ex. B) with the manuscript (Pl. Ex. 1), attached as Addendum C . . . .

ADDENDUM A TO DEFENDANTS' POST-TRIAL MEMORANDUM

Sentence-by-Sentence Analysis of The Nation Article

Paragraph 1:

In his memoirs, A Time to Heal, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff. (Pl.Ex. 10 p. 1) [Pet. at A-31]

Plaintiffs have conceded that this paragraph does not use any material from the manuscript. (Pl.Ex. 11 p. 1) [Pet. at E-2]

Paragraph 2:

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his

"cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger. (Pl.Ex. 10 p. 1) [Pet. at A-31]

The first sentence takes only information and no expression from the manuscript. The information is derived from at least nine manuscript pages, scattered throughout the manuscript. Mr. Nixon's recommendations to Mr. Ford are both statements of government officials and the expression of a person other than Mr. Ford. In addition, much of the material in the manuscript about Nelson Rockefeller consists of Mr. Rockefeller's conversations with Mr. Ford. Under the analysis above, such conversation is a government work, specifically excepted from copyright protection; moreover,

Mr. Rockefeller's words are not original to and thus not copyrightable by Mr. Ford. (Pl.Ex. 1 607-08, 490-91, 42, 44-45, 495-96)

Plaintiffs have conceded that the second sentence of paragraph 2 uses no material from the manuscript. (Pl.Ex. 11 p. 3) [Pet. at E-6]

Paragraph 3:

The Nation obtained the 655-page typescript before publication. Advance excerpts from the book will appear in Time in mid-April and in The Reader's Digest thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Plaintiffs have conceded that paragraph 3 uses no material from the manuscript. (Pl.Ex. 11 p. 3) [Pet. at E-6]

Paragraph 4:

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Plaintiffs have conceded that the first sentence of paragraph 4 uses no material from the manuscript. (Pl.Ex. 11 p. 3) [Pet. at E-6]

The second sentence of paragraph 4 uses only information from the manuscript and no expression. The manuscript states: "on the warm, cloudy morning of August 1, 1974, I received a telephone call from General Alexander M. Haig." (Pl.Ex. 1 p. 1) The article states: "the subject was first broached

to [Ford] by General Haig on August 1, 1974, a week before Nixon resigned." (Pl.Ex. 10) In addition, much of the manuscript consists of then General Haig's statements to President Ford, which are government works and not original to Mr. Ford.

The third sentence of paragraph 4 cannot be said to infringe any rights of plaintiffs for several reasons. First, aside from the cliche "smoking gun," the sentence repeats no language from the manuscript but contains only facts. In addition, the text from which it derives consists of statements by General Haig, some paraphrased, some in quotation, e.g., "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time" (Pl.Ex. 1

p. 4), and thus is not copyrightable by the plaintiffs because it is the expression of a person other than former President Ford and is a government work. Finally, the phrase "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time" is an almost direct quote from the Pardon Testimony, which was, in fact, Mr. Armbrister's source for this portion of the manuscript. (Tr. at 76-77; Deft.Ex. C) (See Pl.Ex. 1 pp. 1-4)

Paragraph 5:

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

The first phrase of the first sentence, "Ford was deeply hurt by Haig's revelation" is a paraphrase of the manuscript.* Because it contains only information and not expression, it infringes no copyright held by plaintiffs.

The quotation beginning "Over the past several months" consists of a report of words spoken by Mr. Nixon to Mr. Ford and as such is not copyrightable by Mr. Ford, both because it is another's expression and because it is an uncopyrightable government work. The last sentence reports only the information from the manuscript and

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* According to Plaintiffs' Exhibit 11, plaintiffs do not claim that the phrase "by Haig's revelation" uses material from the manuscript. (Pl.Ex. 11 p. 4) [Pet. at E-8]

not the expression. The article here reverses the narrative sequence of the manuscript; in the manuscript, Mr. Ford relates the conversation with General Haig and then discusses his prior belief in Mr. Nixon. (See Pl.Ex. 1 p. 7)

Paragraph 6:

> He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

The first sentence reports only facts and does not, except for "ride it out," repeat any language from the manuscript. The manuscript reads: "The first was that he could try to

'ride it out' by letting impeachment take its natural course through the House and Senate trial, fighting against conviction all the way. His second option was to resign." (Pl.Ex. 1 pp. 4-5) The article collapses that information into a single short sentence. The Nation's use of the phrase "ride it out" can hardly be considered the "copying" of expression. The phrase is set out in quotes in the manuscript and appears, as discussed below, in the Pardon Testimony. The second sentence similarly reports facts and does not repeat expression.

In addition, the first two sentences very closely track Mr. Ford's Pardon Testimony (Deft.Ex. B p. 94), and therefore are uncopyrightable because

they are public domain material and because they are a government work. Mr. Armbrister testified that he used here President Ford's "very words before the Hungate Committee." (Tr. at 84) Moreover, this portion of the manuscript recounts General Haig's statement to then Vice President Ford and this is not copyrightable as the expression of someone other than Ford, and as a statement by a government official.

The third sentence contains a simple report of the facts and a quotation. The reporting uses no expression. In addition, the manuscript material from which the sentence derives tracks the Pardon Testimony (Deft.Ex. B p. 94) and consists entirely of conversations between government

officials, and thus is uncopyrightable. (Pl.Ex. 1 pp. 4-6)

Paragraph 7:

> "It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

The quotation is contained verbatim in the Pardon Testimony and therefore is both a government work and in the public domain. (See Pl.Ex. 43 p. 1016; Deft. Ex. B pp. 93-94) As a statement by General Haig, it is both a government work and the expression of a person other than Mr. Ford. (See Pl.Ex. 1 p. 6)

Paragraph 8:

> But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told

President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Except for the last sentence, the paragraph consists not of expression but of a report of facts contained in the manuscript, which reads:

> "After several moments, Hartmann interrupted my reverie. I asked him to schedule an appointment with St. Clair first thing in the morning; then I told him about my latest conversation with Haig. As I repeated the options that Haig had listed for me, warning bells seemed to go off inside his head. 'That's why you should have had a witness there,' he said.
>
> "'What do you mean?'
>
> "'That last option Haig mentioned, that Nixon resign in return for an agreement that he receive a pardon from the new President. I don't like that at all.'
>
> "'But, Bob,' I replied, 'Al wasn't suggesting that. It was just one of the ideas that he said were being kicked around by people at the White House.'

> "'I know, I know. But Haig didn't come over here to go away empty-handed. And he didn't discuss this delicate matter without Nixon's knowing about it. And he mentioned the pardon option, and you sat there listening to him. Well, silence implies assent. He probably went back to the White House and told Nixon that he'd mentioned the idea and that you weren't uncomfortable with it. It was extremely improper for him to bring the subject up.'" (Pl. Ex. 1 pp. 8-9)

Because both Messrs. Ford and Hartmann were government officials their discussion is an uncopyrightable work of the United States government. In addition, Mr. Hartmann's words were not original to Mr. Ford. Mr. Armbrister testified that the phrase "silence implies assent" quoted in The Nation came directly from Mr. Hartmann. (Tr. at 89; see Deft.Ex. D p. 4) (See Pl.Ex. 1 pp. 8-9)

Paragraph 9:

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

The only relationship of the first sentence -- about Mr. Ford's meeting with James St. Clair -- to the manuscript is that it reports the facts of Mr. Ford's conversations with Mr. St. Clair. Moreover, both Mr. St. Clair and President Ford held positions in the federal government and their statements consequently are works of the United States government. Mr. Armbrister testified that the Pardon Testimony was

the source for the language that Mr. St. Clair commented "that he had not been the source of any White House staff opinion about a president's power to issue pardons." (Pl.Ex. 1 p. 15) (Tr. at 91; see Deft.Ex. B p. 95) Finally, Mr. St. Clair's statement originated with him and thus cannot be copyrighted by Mr. Ford.

The second sentence of paragraph 9, except for the two short quotations, reports only the facts contained in the manuscript and not the expression. Then Vice President Ford's discussion with his aide, Jack Marsh, is a work of the United States government and not subject to copyright. Both Mr. Marsh's and Mr. Harlow's statements, small parts of which are quoted in the article, did not

originate with Mr. Ford and cannot be copyrighted by him. (See Pl.Ex. 1 pp. 14-16, 18)

Paragraph 10:

> As a result of these various conversations, Vice President Ford called Haig, and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

The lead-in phrase before the quotation is fact from the manuscript, not expression. The manuscript's version of this is:

> "We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so there could be no ambiguities." (Pl.Ex. 1 p. 19)

The quotation in the article of then Vice President Ford's statement to General Haig does not infringe any copyright held by plaintiffs. Mr. Armbrister testified that this statement had been derived virtually verbatim from the Pardon Testimony. (Tr. at 93; Deft.Ex. B p. 95)* This statement, having been written down by President Ford, is unambiguously a work of the United States government. Plaintiffs' assertion that this document is no longer in existence is irrelevant to the conclusion that the statement

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* This testimony by Mr. Armbrister is a retraction of the assertion previously made in an affidavit submitted to this Court [the District Court] that the statement to General Haig was recreated without the aid of any documents and forms the central literary body of the book. (Deft. Ex. J; Tr. at 96-97)

was written by then Vice President Ford for the purpose of communicating to the White House Chief of Staff, General Haig, Mr. Ford's position that no promises had been made concerning the pardon of President Nixon.

Paragraph 11:

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

The first sentence of paragraph 11 reports the information contained in the manuscript and not the expression. Plaintiffs concede that the first phrase of this sentence does not infringe any copyrighted material. (Pl.Ex. 11 p. 7) [Pet. at E-14] The second sentence in The Nation article is a quotation of

arguably copyrightable material from the manuscript. (See Pl.Ex. 1 p. 21)

Paragraph 12:

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

The quotations in this paragraph of the article are of arguably copyrightable material. The rest of the paragraph is simply context for the quotations and uses no expression from the manuscript. The plaintiffs concede that the phrase "in justifying the pardon" does not use material from the manuscript. (Pl.Ex. 11 p. 7) [Pet. at E-14] (See Pl.Ex. 1 pp. 265-66, 234-36)

Paragraph 13:

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information -- i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth Jr., as being especially persuasive. Ruth had written:

> "If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

The first sentence* condenses information from the book. In contrast

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* Plaintiffs concede that the phrase "The precipitating factor in his decision was" does not infringe any of plaintiffs' rights. (Pl.Ex. 11 p. 8) [Pet. at E-16]

to the article, the manuscript uses several sentences to state the same information:

> "For the past several days, Buchen had also been meeting with Jaworski. Their contacts had been facilitated by the fact that both men were staying at the Jefferson Hotel. They could shuttle between floors without attracting undue attention." (Pl.Ex. 1 p. 246)

The second sentence largely consists of factual reporting. While use of the two quotations might possibly be construed as use of expression, the presence of these three words in a paragraph otherwise containing only facts does not rise to the level of copying expression.

The third sentence is once again a simple reporting of facts and not copying of expression.

Plaintiffs hold no copyright in the paragraph from the memorandum by Henry Ruth. This memorandum is a government document, written to Mr. Jaworski by his assistant. Mr. Armbrister obtained the memorandum from Mr. Jaworski's book (Tr. at 99-100; Pl.Ex. 44 p. 2046; Deft.Ex. PP p. 229), which was published and copyrighted before President Ford's book. Nor did this expression originate with Mr. Ford. (See Pl.Ex. 1 pp. 246-40)

Paragraph 14:

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

The first section of the sentence relays facts contained in the manuscript. The quotation about Nixon in

San Clemente did not originate with Mr. Ford, but with James Humes. (Tr. at 100; Pl.Ex. 44 p. 1214) Thus, the use of it in The Nation is not a use of material copyrightable by plaintiffs. The last portion of paragraph 14 quotes arguably copyrightable material. (See Pl.Ex. 1 pp. 237-38)

Paragraph 15:

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Compared with the far fuller exposition in the manuscript (Pl.Ex. 1 pp. 239-41), this paragraph pared down and reported only facts. In addition, the advice given to President Ford by his aides is a government work originated by persons other than Mr. Ford.

Paragraph 16:

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

This paragraph uses only facts and not expression from the manuscript. The words attributed to Mr. Buchen on page 243 of the manuscript originated with Mr. Buchen and not with Mr. Ford. (Tr. at 100-02; Deft.Ex. D p. 3) Both Mr. Ford's and Mr. Buchen's statements are government works, which plaintiffs may not copyright. (See Pl.Ex. 1 p. 243)

Paragraph 17:

At one point a plan was considered whereby the Presidential materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

This paragraph only reports information as opposed to expression.

(See Pl.Ex. 1 pp. 244-45)

Paragraph 18:

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Plaintiffs concede that the second sentence of this paragraph contains no material from the manuscript. (Pl.Ex. 11 p. 11) [Pet. at E-22] Except for the quote at the end, paragraph 18 only reports information from the manuscript. The expression in the manuscript differs significantly from

the narrative of the article. The manuscript reads:

> "Then Phil added: 'Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that would tell the world, 'yes, he did it, and he's accepting the pardon because he's guilty.'" (Pl.Ex. 1 p. 246) [check against Ford ms.]

In addition, Mr. Buchen's and Mr. Miller's words did not originate with Mr. Ford. Mr. Armbrister testified that Mr. Buchen told him what he himself had said (Tr. at 102-03; Deft. Ex. D p. 3), and that Mr. Becker relayed the words of Mr. Miller. (Tr. at 103; Deft.Ex. D pp. 3-4) Thus the manuscript material did not originate with Mr. Ford and The Nation's use of it, by quotation

or otherwise, did not use material copyrightable by plaintiffs. Finally, Mr. Buchen's statements are works of the United States government. (See Pl.Ex. 1 pp. 245-46)

Paragraph 19:

> The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Zeigler, Nixon's former press secretary. "Let's get one thing straight immediately," Zeigler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Zeigler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

Plaintiffs concede that the first sentence of this paragraph does not infringe any copyright. (Pl.Ex. 11 p. 12) [Pet. at E-24] The second

sentence simply conveys information from the manuscript. The quotation from Ron Zeigler did not originate with former President Ford and in fact Mr. Armbrister testified was relayed to him by Mr. Becker. (Tr. at 104; Deft.Ex. D p. 4)

The next sentence -- "Zeigler proposed a draft, which was turned down on the ground that 'no statement would be better than that.'" (Pl.Ex. 1 p. 25) -- reports information contained in the manuscript and then quotes the manuscript's description of Mr. Becker's reaction. The expression repeated in the sentence did not originate with President Ford but rather with Mr. Becker; the remainder conveys

information. (Tr. at 105; see Deft.Ex. D p. 4)

The final sentence of paragraph 19 reports information and copies no expression. (See Pl.Ex. 1 pp. 245-52)

Paragraph 20:

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Except for the last small quotation, this paragraph recounts only information. The manuscript itself attributes the statement to Mr. Nixon. Moreover, Mr. Armbrister testified that it was Mr. Becker who supplied the two quotations. (Tr. at 105-06; Deft.Ex. D p. 4) (See Pl.Ex. 1 pp. 253-54)

Paragraph 21:

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible."

The first sentence of this paragraph is editorial material unrelated to any expression in the manuscript. Plaintiffs concede that the word "Ultimately" is not at issue in this case. (Pl.Ex. 11 p. 3) [Pet. at 26] The material concerning Mr. Ford's philosophy was first voiced by Mr. James Humes in an interview with Mr. Ford and Mr. Armbrister and is thus not original to President Ford. (Pl.Ex. 44 pp. 2091-92)

Paragraph 22:

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former president a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

> "He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death."

The first sentence of this paragraph only conveys the information recited in the manuscript. The quotations are from arguably copyrightable material. (See Pl.Ex. 1 pp. 298-99)

Paragraph 23:

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

Plaintiffs concede this paragraph makes no use of the manuscript. (Pl. Ex. 11 p. 15) [Pet. at E-30]

Paragraph 24:

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

The first sentence* condenses the material from the manuscript into the facts and takes no expression. The second sentence is a statement made by a government official in the course of his duties and, therefore, a work of

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* Plaintiffs concede that the heading of this paragraph, "On Kissinger" makes no use of material from the manuscript. (Pl.Ex. 11 p. 15) [Pet. at E-30]

the United States government. (See Pl. Ex. 1 pp. 45-46)

Paragraph 25:

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

This paragraph is also a work of the United States government; moreover, the expression originated with Mr. Kissinger and not Mr. Ford. (Deft.Ex. D p. 1) (See Pl.Ex. 1 p. 46)

Paragraph 26:

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

This paragraph similarly consists of government works or only reports information. In addition, the statement attributed to former President Ford,

"We'll get along . . . I know we'll get along" in fact came from Mr. Kissinger. (Deft.Ex. D p. 7) (See Pl.Ex. 1 p. 46)

Paragraph 27:

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

This paragraph reports information contained in widely separated pages of the manuscript, (Pl.Ex. 1 pp. 494, 537) and repeats none of Mr. Ford's expression. Moreover, President Ford's statements to Mr. Kissinger and Mr. Rumsfeld and Mr. Kissinger's remarks recounted in the manuscript are

statements of public officials, which are works of the United States government. In addition, Mr. Kissinger's remarks did not originate with Mr. Ford and are not copyrightable by plaintiffs. (Pl.Ex. 1 pp. 491-92, 494-95, 436-37)

Paragraph 28:

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

The quotation in the first sentence of paragraph 28* derives from a

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* Plaintiffs concede that the heading of this paragraph, "On John Connally", makes no use of material from the manuscript. (Pl.Ex. 11 p. 16) [Pet. at E-32]

discussion between then Congressman Ford and President Nixon, and thus is a work of the United States government. Moreover, Mr. Nixon's statement to Mr. Ford is not original to Mr. Ford. The second sentence, also derived from government works material and based on Mr. Nixon's statement not original to Mr. Ford, has no quotations and only reports information. The third sentence is also derived from government material and is a quotation of former President Nixon's words not original to President Ford. The final sentence, similarly derived from government material, is in fact a paraphrase of the manuscript despite the presence of quotation marks in the article: the manuscript reads, "'That's no problem as far as I'm

concerned,' I said" (Pl.Ex. 11 p. 156) [Pet. at E-33]; the article reads, "Ford says he had 'no problem with that.'" (See Pl.Ex. 1 pp. 155-56)

Paragraph 29:

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

This paragraph reports only information and not expression.*

(See Pl.Ex. 1 p. 216)

Paragraph 30:

Kissinger talked him out of it. "You can't do that. It would be

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* Plaintiffs concede that the heading of this paragraph, "On the Decision to Run Again," uses no material from the manuscript. (Pl.Ex. 11 p. 17) [Pet. at E-34]

disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

The first sentence only reports information. The quotation from Mr. Kissinger is uncopyrightable by Mr. Ford both as the expression of a third person and as the statement of a work of the United States government. (See Pl.Ex. 1 pp. 216-17)

Paragraph 31:

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the Mayaguez. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed

to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

This paragraph only reports facts from the manuscript.* Moreover, the underlying material in the manuscript is an account of a discussion about the Mayaguez crisis and thus is uncopyrightable as statements by government officials and as others' expression.

(See Pl.Ex. 1 pp. 414-15)

Paragraph 32:

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently had considered it, but

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* Plaintiffs concede that the heading, "On David Kennerly, the White House photographer," uses no material from the manuscript. (Pl.Ex. 11 p. 18) [Pet. at E-36]

following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."

The first sentence is not original to Mr. Ford; Mr. Armbrister testified also that this line was conveyed to him by Mr. Kennerly. (Tr. at 108)

The second sentence consists of information from the book and editorial material by The Nation: "the view carried the day." The quotations contained in the rest of the paragraph are arguably copyrightable material. (See Pl.Ex. 1 pp. 415-17)

Paragraph 33:

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and

expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Except for the connectives supplied by The Nation,* this paragraph consists of arguably copyrightable material. (See Pl.Ex. 1 pp. 52-53)

Paragraph 34:

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to to wonder whether Nixon had known in advance about Watergate.

The first sentence reports information from the manuscript. The quotation in the second sentence is of arguably

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* Plaintiffs concede that the heading, "On Nixon's Character" uses no material from the manuscript. (Pl.Ex. 11 p. 19) [Pet. at E-38]

copyrightable material; the latter part of that sentence only reports information from the manuscript. (See Pl. Ex. 1 p. 54)

Paragraph 35:

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

Except for the quotation at the end of this sentence, arguably copyrightable material, the paragraph reports only facts and not expression. (See Pl.Ex. 1 pp. 55-57)

Paragraphs 36 - 38:

In February of last year, when The Washington Post obtained and printed advance excerpts from H.R. Haldeman's memoir, The Ends of Power, on the eve of its publication by Times Books, The New York Times called The Post's feat "a second-rate burglary."

The Post disagreed, claiming that its coup represented "first-rate

enterprise" and arguing that it had burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here -- a First Amendment principle that was central to the Pentagon Papers case."

In the issue of The Nation dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

Plaintiffs concede that these paragraphs are not at issue in this lawsuit. (Pl.Ex. 11 p. 20) [Pet. at E-40]

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———: INFORMATION

———: DERIVED FROM MATERIAL THAT IS OTHERS' EXPRESSIONS

-: DERIVED FROM MATERIAL THAT IS GOVERNMENT WORKS

———: DERIVED FROM MATERIAL THAT IS PUBLIC DOMAIN

———: ARGUABLY COPYRIGHTABLE

———: PLAINTIFFS CONCEDE NOT AT ISSUE

Paragraph 1:

In his memoirs, A Time to Heal, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Paragraph 2:

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

Paragraph 3:

The Nation obtained a 655-page typescript before publication. Advance excerpts from the book will appear in

Time in mid-April and in The Reader's Digest thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Paragraph 4:

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Paragraph 5:

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

Paragraph 6:

He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any

recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

Paragraph 7:

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

Paragraph 8:

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned

the idea and Ford seemed comfortable with it. "Silence implies assent."

Paragraph 9:

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

Paragraph 10:

As a result of these various conversations, Vice President Ford

called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Paragraph 11:

Despite what Haig had told him about the "smoking gun" tapes, Ford told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

Paragraph 12:

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

Paragraph 13:

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information -- i.e., that Nixon was under investigation in ten separate areas, and that the court

process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth, Jr., as being especially persuasive. Ruth had written:

"If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say:

"One can make a strong argument for leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Paragraph 14:

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would

be virtually impossible for me to direct public attention on anything else."

Paragraph 15:

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Paragraph 16:

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

Paragraph 17:

At one point a plan was considered whereby the Presidential materials

would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

Paragraph 18:

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Paragraph 19:

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with an ultimatum by Ron Ziegler, Nixon's former press secretary. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Ziegler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

Paragraph 20:

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Paragraph 21:

Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy

demanded that I put Nixon -- and Watergate -- behind us as quickly as possible."

Paragraph 22:

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion."

Ford went:

"He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I

thought I had never seen anyone closer to death."

Paragraph 23:

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

Paragraph 24:

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay, I'll do everything I can to work with you."

Paragraph 25:

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

Paragraph 26:

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

Paragraph 27:

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of

Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

Paragraph 28:

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

Paragraph 29:

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Paragraph 30:

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign

policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

Paragraph 31:

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the Mayaguez. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House

photographer, David Kennerly, who had been taking pictures for the last hour.

Paragraph 32:

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."

Paragraph 33:

On Nixon's Character. Nixon's flaw, according to Ford, was "pride,"

"A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Paragraph 34:

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

Paragraph 35:

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

Paragraph 36:

In February of last year, when The Washington Post obtained and printed advance excerpts from H.R. Haldeman's memoir, The Ends of Power, on the eve of its publication by Times Books, The New York Times called The Post's feat "a second-rate burglary."

Paragraph 37:

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had burglarized nothing, that publication of

the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here -- a First Amendment principle that was central to the Pentagon Papers case."

Paragraph 38:

In the issue of The Nation dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

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ADDENDUM B TO DEFENDANTS'
POST-TRIAL MEMORANDUM

Comparison of The Nation Article
With the Manuscript

Paragraph 1

In his memoirs, A Time to Heal, which Harper & Row will publish in late May or early June, former President Gerald R. Ford says that the idea of giving a blanket pardon to Richard M. Nixon was raised before Nixon resigned from the Presidency by Gen. Alexander Haig, who was then the White House chief of staff.

Manuscript

[none]

Paragraph 2

Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate, that Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the Central Intelligence Agency, that Nixon was the one who first proposed Nelson Rockefeller for Vice President, and that he regretted his "cowardice" in allowing Rockefeller to remove himself from Vice Presidential contention. Ford also describes his often prickly relations with Henry Kissinger.

Manuscript

About a month before the convention, my aides had met with Reagan's representatives to discuss the need for party unity. And they had reached an agreement. At the end of the Presidential balloting, the winner would go to the loser's hotel suite and congratulate his opponent for waging a fine campaign. Together, they would appear at a press conference and urge all Republicans to put aside their differences and rally behind the ticket. That was the only way we could leave Kansas City with a hope of victory. When it appeared that I was going to win, Sears contacted Cheney and refined the scenario. He insisted on two conditions. The first was that I had to see Reagan alone; there could be no aides from either camp in the room. Secondly, under no circumstances should I offer him the nomination to be Vice President. Reagan had said all along that he wasn't interested in the job. He had meant what he said. If I tried to talk him out of it, he would have to turn me down, and that would be embarrassing because it would appear that he was refusing to help the GOP. When Cheney relayed those conditions to me, I agreed to go along with them. I would need Reagan's assistance in the fall campaign. It would be stupid to anger him or his followers at this moment.

Later I was told that just before my arrival at the Californian's hotel, one of his closest advisers, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate. Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. Had I been aware of the Dart-Reagan conversation, would I have chosen him? I can't say for sure -- I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's policies -- but I certainly would have considered him. (Pl. Ex. 1 pp. 607-08)

* * *

Next I thought about other changes that I wanted to make. Bill Colby had been director of the CIA at a traumatic period in the agency's history. He had gone through hell and, in my opinion, done a splendid job. In the fall of 1975, many people felt that I was angry at him for disclosing too much about CIA activities in his appearances before Congressional committees. That was

not the case. He was on a hot seat before one committee after another. I supported his decision to tell the truth about past agency misdeeds even though both of us recognized that his testimony would be embarrassing. Colby was smart; he possessed both integrity and guts, and I liked and respected him very much. Yet my personal regard for him did not alter my conviction that the agency needed a change at the top. Colby had completed his exhaustive Capitol Hill testimony about past CIA activities. Drawing essentially on the excellent recommendations of the Rockefeller commission, we had proceeded with plans to reorganize and reform the agency. If that reorganization was to have the substance as well as the image of a significant change, we had to appoint a new man to preside over it.

Washington attorney Edward Bennett Williams was my first choice. He was a brilliant lawyer, a savvy Washingtonian with an interest in intelligence matters and a Democrat, which meant that he'd probably win Senate confirmation easily. (Pl. Ex. 1 pp. 490-91)

* * *

Ten minutes later, I entered the White House. I stopped at Haig's office first. His eyes told me all I

needed to know. I walked into the Oval Office alone. Nixon was sitting behind his desk, but he stood up as soon as I entered the room. We shook hands; he said, "Sit down," and I took the chair to his right. (Pl. Ex. 1 p. 42)

* * *

Then we talked about who my Vice President would be. He suggested that Nelson A. Rockefeller, the four-term governor of New York, would be a wise selection. He didn't identify anyone else by name. "There are a number of good people," he said. "It's your choice. I won't be talking to you again, but you'll want somebody who will add stature to the Administration, somebody who will generate national as well as international confidence." (Pl. Ex. 1 pp. 44-45)

* * *

Now as Rockefeller and I talked on October 28 we discussed the growing strength of the GOP's right wing. Perhaps, he said, the best thing he could do would be to withdraw from consideration as my running mate. He would rather do that voluntarily than as the direct result of pressure from conservatives. "Mr. President," he said, "I'll do anything you want me to do. I'll be on the ticket or I'll be off the ticket. You just say the word."

As we talked, I didn't try to gloss over the fact that conservative opposition to him might jeopardize my own nomination. "There are serious problems," I said, "and to be brutally frank, some of these difficulties might be eliminated if you were to indicate that you didn't want to be on the ticket in 1976. I'm not asking you to do that, I'm just stating the facts."

"I understand," he said. "Well, it's probably better that I withdraw. If I take myself out of the picture, that will clear the air. I'll give you a letter saying that I don't want to be considered as a Vice Presidential nominee."

I knew how he felt, and that bothered me. He had suffered so many setbacks in his political life, and this was one more.

"You've been very loyal," I said. "We've had a fine relationship, and I hope that despite this, that loyalty and friendship will endure."

Nelson said that it would. As I walked him to the door, I put my arm around his shoulder. I was grateful for his expression of unselfishness, his willingness to do what was in the best interests of the party and the country -- and me. At the same time, I was very sad, because I had failed

to express the depth of my feeling for him. Inwardly, I was angry with myself for showing cowardice in not saying to the ultra-conservatives, "It's going to be Ford and Rockefeller, whatever the consequences." (Pl. Ex. 1 pp. 495-96)

Paragraph 3

The Nation obtained a 655-page typescript before publication. Advance excerpts from the book will appear in Time in mid-April and in The Reader's Digest thereafter. Although the initial print order has not been decided, the figure is tentatively set at 50,000; it could change, depending upon the public reaction to the serialization.

Manuscript

[none]

Paragraph 4

Ford's account of the Nixon pardon contains significant new detail on the negotiations and considerations that surrounded it. According to Ford's version, the subject was first broached to him by General Haig on August 1, 1974, a week before Nixon resigned. General Haig revealed that the newly transcribed White House tapes were the equivalent of the "smoking gun" and that Ford should prepare himself to become President.

Manuscript

Part I

"Uncertain Days"

"I know there is a God. I see the storm coming, and I know His hand is in it. If He has a place for me, and I think He has, I believe I am ready; with God's help I shall not fail."

--Abraham Lincoln to his friend
Newton Bateman before the
Presidential election of 1860

Shortly before 9 o'clock on the warm, cloudy morning of August 1, 1974, I received a telephone call from General Alexander M. Haig, Jr. For the past 15 months -- ever since the resignations of H.R. Haldeman and John Ehrlichman -- Haig had been serving as White House Chief of Staff, and he had done a magnificent job in an almost impossible situation.

"Mr. Vice President," he said, "it's urgent that I see you as soon as possible."

I could tell from the tone of his voice that something very important was happening and that he didn't want to discuss it on the telephone. "Well, sure," I replied. "Come on over now. We have some meetings on the schedule, but we can push them back."

Fifteen minutes later, Haig arrived at my office on the second floor of the Executive Office Building. Robert Hartmann, the brusque former newspaperman who was serving as my Chief of Staff, had been talking with me about routine-business, and I'd asked him to stay for the session with Haig. This, too, was routine. Whenever I had a meeting on a matter of some importance, the staff always made sure that a witness was there. But Haig did not know Hartmann well. He seemed surprised by his presence, and I had the impression that he didn't feel he could be as forthright as he might normally have been. Still, what he did say was worrisome enough.

Eight days earlier, on July 24, the Supreme Court had ruled that President Richard M. Nixon had to turn over to U.S. District Court Judge John Sirica the tape recordings of sixty-four conversations that had been taped in the President's offices. The Court felt that they might contain evidence for the pending cover-up trial of six of Nixon's former aides. The President had already turned over transcripts of twenty of those tapes; other tapes were scheduled to be delivered to Sirica on Monday, August 5. And those others were the ones that bothered Haig.

"I want to alert you that things are deteriorating," he said. "The whole ball game may be over. You'd better start thinking about a change in your life. I can't tell you what's going to happen, but I have to tell you what I know."

The new tapes, he said, contained evidence that would contradict Nixon's version of events in the Watergate scandal. The evidence would prove that Nixon knew about the cover-up six days after the break-in at the Democratic National Committee headquarters and that he'd been deceiving the American people ever since. He hadn't seen the evidence himself, Haig said, but he'd been told about it by people who had. They had explained that it contained the so-called smoking gun, and he felt sure that they were telling the truth. (Pl. Ex. 1 pp. 1-3)

* * *

Shortly after noon that day, I drove to Capitol Hill. No sooner had I entered my office off the Senate floor than Haig telephoned again. He wanted another meeting as soon as possible, and this time he didn't want Hartmann there.

When Haig appeared at three-thirty that afternoon, he looked even more beaten and harrassed than he had

earlier. Since our morning meeting, he had either read the transcripts or heard them discussed in great detail. The tapes made clear that Nixon knew the whole story on June 23, 1972. And when that evidence became public, Nixon's case would disintegrate. In moments of stress, Haig proceeds very deliberately, choosing his words with great care. Now he came to the point: "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time?" (Pl. Ex. 1 p. 4)

Paragraph 5

Ford was deeply hurt by Haig's revelation: "Over the past several months Nixon had repeatedly assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade from view." Ford had believed him, but he let Haig explain the President's alternatives.

Manuscript

Throughout my political life, I always believed what I was told. I was truthful to others; I expected others to be truthful with me. Repeatedly over the past several months, Nixon had assured me that he was not involved in Watergate, that the evidence would prove his innocence, that the matter would fade

from view. He had said much the same thing to his Cabinet and staff, to his family and to the American people. I had chosen to believe him, and I had tried to give him the benefit of every doubt. One reason for my support was our long association together. We had been friends for twenty-five years. I had campaigned for him; he had campaigned for me, and there had never been a time when I felt he wasn't telling me the truth. A second reason, of course, was the office I held. I simply <u>had</u> to support him. If I did anything else, people would charge that I was undercutting him in order to acquire the Presidency myself.

My staff saw what was coming much earlier than I did. On several occasions during that spring and summer, Hartmann or Jack Marsh, a former Congressman from Virginia, who was one of my closest aides, came into my office and said, "Well, it looks closer and closer, your becoming President." And I always brushed it off, partly because I didn't want to believe it and partly because I didn't want to say the slightest thing to anyone that might be construed as an effort to undermine Nixon. Indeed, until that moment, I had agreed with St. Clair and others that as a matter of law, the President was not guilty of an impeachable offense. Bad judgment, yes, but not an impeachable offense.

And now this. I was angry that Nixon hadn't told me the truth. (Pl. Ex. 1 p. 7)

<u>Paragraph 6</u>

He could "ride it out" or he could resign, Haig said. He then listed the different ways Nixon might resign and concluded by pointing out that Nixon could agree to leave in return for an agreement that the new President, Ford, would pardon him. Although Ford said it would be improper for him to make any recommendation, he basically agreed with Haig's assessment and adds, "Because of his references to the pardon authority, I did ask Haig about the extent of a President's pardon power."

<u>Paragraph 7</u>

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to grant a pardon even before criminal action has been taken against an individual."

<u>Manuscript</u>

"If it happens, Al, I am prepared," I said. Our conversation that day had an unusual formality, both of us aware that we were speaking not only as friends but also for the record book.

"I can't tell you what's going to happen in the next forty-eight hours," he went on. "I just don't know what the President is going to do." Haig said he had discussed the new evidence with Nixon the afternoon before, and Nixon had brushed it off by saying that it was "manageable." Everyone else who knew about it disagreed. Carefully, Haig laid out the options that the "knowledgeable people" on the White House staff had agreed were still available to the President. The first was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. His second option was to resign.

Here the number of alternatives increased. Under provisions of the 25th Amendment to the Constitution, he could step aside temporarily. He could delay his resignation until further along in the impeachment process. He could try to settle for a censure vote in the Congress. He could pardon himself and everyone else involved in Watergate and then resign. Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President -- Gerald Ford -- would pardon him. Haig emphasized that these weren't <u>his</u> suggestions.

He didn't identify the staff members and he made it very clear that he wasn't recommending any one option over another. What he wanted to know was whether or not my overall assessment of the situation agreed with his.

I had no doubts about his basic assumptions. If Nixon tried to "ride it out," he'd be impeached in the House, and the odds were overwhelming that he'd be convicted in the Senate. These new tapes would cause a groundswell of demands for his immediate resignation. But that's where Nixon's peculiar personality came into play. He was not one to quit. If someone went to him and said, "You must resign tomorrow," that would inevitably tilt his decision to stay and fight it through. Pressure couldn't be applied directly.

Haig agreed completely with that. Next he asked if I had any suggestions as to courses of action for the President. I didn't think it would be proper for me to make any recommendations at all, and I told him so. Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power.

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority

to grant a pardon even before criminal action has been taken against an individual." He didn't name the lawyer. Nor did he say whether or not that authority existed before the individual had been indicted. It was simply a general interpretation. (Pl. Ex. 1 pp. 4-6)

Paragraph 8

But because Ford had neglected to tell Haig he thought the idea of a resignation conditioned on a pardon was improper, his press aide, Bob Hartmann, suggested that Haig might well have returned to the White House and told President Nixon that he had mentioned the idea and Ford seemed comfortable with it. "Silence implies assent."

Manuscript

After several moments, Hartmann interrupted my reverie. I asked him to schedule an appointment with St. Clair first thing in the morning; then I told him about my latest conversation with Haig. As I repeated the options that Haig had listed for me, warning bells seemed to go off inside his head. "That's why you should have had a witness there," he said.

"What do you mean?"

"That last option Haig mentioned, that Nixon resign in return for an agreement that he receive a pardon from the new President. I don't like that at all."

"But, Bob," I replied, "Al wasn't suggesting that. It was just one of the ideas that he said were being kicked around by people at the White House."

"I know, I know. But Haig didn't come over here to go away empty-handed. And he didn't discuss this delicate matter without Nixon's knowing about it. And he mentioned the pardon option, and you sat there listening to him. Well, silence implies assent. He probably went back to the White House and told Nixon that he'd mentioned the idea and that you weren't uncomfortable with it. It was extremely improper for him to bring the subject up."

That reaction was typical of Bob. Because I'm not by nature suspicious of people or their motives, I thought it would be wise to have someone on my staff who was. And Bob was suspicious of everyone. Over the years that Hartmann characteristic had saved me from many pitfalls. This time, however, I thought he was overreacting, making a mountain out of a molehill, and I told him so.

"Well," he replied, "I think you ought to get Jack Marsh's judgment on this."

I looked at my watch. It was five-thirty. Betty, I knew was waiting for me in the limousine outside. The options discussion would have to be put off. "All right," I told Bob. "I'll talk to Jack, but I don't have time now. I've got to go." (Pl. Ex. 1 pp. 8-9)

Paragraph 9

Ford then consulted with White House special counsel James St. Clair, who had no advice one way or the other on the matter more than pointing out that he was not the lawyer who had given Haig the opinion on the pardon. Ford also discussed the matter with Jack Marsh, who felt that the mention of a pardon in this context was a "time bomb," and with Bryce Harlow, who had served six Presidents and who agreed that the mere mention of a pardon "could cause a lot of trouble."

Paragraph 10

As a result of these various conversations, Vice President Ford called Haig and read him a written statement: "I want you to understand that I have no intention of recommending what the President should do about resigning or not resigning and that

nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."

Manuscript

Shortly after eight o'clock the next morning, I met with James St. Clair, the Boston attorney who had been handling Nixon's impeachment defense for the past seven months. A soft-spoken, rather handsome man, St. Clair had a retiring, almost self-effacing manner that belied a first-rate legal mind.

Until our meeting that morning, I had assumed that St. Clair had been given access to all material relevant to the Watergate affair. Yet, it was obvious to me that the three June 23 tapes of Nixon's conversations with Haldeman had caught him by surprise. He was shocked by them. "Until I found out about those tapes," he said, speaking very deliberately, "I was absolutely convinced that the President was not guilty of an impeachable offense, and I was preparing my defense based on that belief."

"What's your assessment now?"

"Probably the same as yours," he said. "Unquestionably, this will lead the House to impeach the President.

It'll lead the Senate to convict him. The only question now is: What does he do? Resign or fight it through?"

Neither one of us could know his answer then. Quickly I asked St. Clair, "Do you know of any other new or damaging evidence besides what's on the June 23 tapes?"

"No," he replied.

Then I told him about the options that Haig has mentioned to me the afternoon before. St. Clair listened quietly, commenting only that he had not been the source of any White House staff opinion about a President's power to issue pardons.

No sooner had St. Clair left than I called in Marsh. I briefed Jack on everything that had occurred in the past twenty-four hours. He seemed just as stunned by the news as I had been. That is not to say that he registered much emotion. Anyone who can make thirty-eight parachute jumps while serving as a Congressman has to be fairly calm and unflappable. And Jack was certainly that. But he was also a man of incredibly good judgment. He agreed with Bob that the mere mention of the pardon option constituted a potential time bomb for me. I explained that Haig was not suggesting a deal, that these

options hadn't even originated with him, that I had said nothing to signal approval or disapproval of any of them. But like Hartmann, Marsh was adamant. "If you don't believe us," Jack said, "talk to someone else whose advice you value." I agreed to do that.

The question then became: To whom could I turn? Almost instantly, Bryce Harlow came to mind. A short, solemnfaced Oklahoman who had already served six Presidents, he was a man of total integrity. Possessed of infinite tact -- in 1972, when the late House Majority Leader Hale Boggs and I traveled to the People's Republic of China, Harlow was the man I asked to bridge the gap between our staffs -- he also had more common sense and political perception than anyone I knew. I was sure I could rely upon him totally, and I told Hartmann to arrange a meeting as soon as possible. (Pl. Ex. 1 pp. 14-16)

* * *

My schedule that afternoon was crowded as usual: an interview with James Reston of the New York Times, a session with representatives of the National League of Families of American Prisoners and Missing in Southeast Asia, individual meetings with Deputy Assistant Secretary of Defense Roger Shields, Office

Management and Budget Director Roy Ash and Secretary of the Treasury William Simon. Then there was that all-important get-together with Bryce Harlow. He came to my office late in the afternoon and, with Hartmann present, I told him everything I knew. He listened impassively, his expression betraying no emotion at all. Only after I had finished did he let me know in no uncertain terms that he agreed with Bob and Jack, that the mere mention of the pardon option could cause a lot of trouble in the days ahead.

We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so that there could be no ambiguities. "I want you to understand," I said, "that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make." (Pl. Ex. 1 pp. 18-19)

Paragraph 11

Despite what Haig had told him about the "smoking gun" tapes, Ford

told a Jackson, Mich., luncheon audience later in the day that the President was not guilty of an impeachable offense. "Had I said otherwise at that moment," he writes, "the whole house of cards might have collapsed."

Manuscript

Shortly after ten that morning, Air Force II touched down at the Golden Triangle Regional Airport in Starkville, Mississippi. I spoke at a rally there for our House candidate, Ben Hilborn. Then we reboarded the plane for the forty-minute flight to Jackson. Representative Thad Cochran (who was elected Mississippi's first Republican Senator in 1979) was among the notables who met me as I stepped onto the tarmac and escorted me to a luncheon at the Jackson Hilton Hotel. During the luncheon I repeated my assertion that the President was not guilty of an impeachable offense. Had I said otherwise at that moment, the whole house of cards might have collapsed. (Pl. Ex. 1 p. 21)

Paragraph 12

In justifying the pardon, Ford goes out of his way to assure the reader that "compassion for Nixon as an individual hadn't prompted my decision at all." Rather, he did it because he had "to get the monkey off my back one way or the other."

Manuscript

I knew when I became President that hard decisions would produce some bitter reactions. Still, I wasn't prepared for the allegations that the Nixon pardon prompted. What I had intended to convince my fellow citizens was necessary surgery -- essential if we were to heal our wounded nation -- was being attacked as a "secret deal" that I had worked out with Nixon before he had resigned. And the timing of the announcement -- eleven o'clock on Sunday morning -- was being touted as "proof" of the conspiracy.

Any doubts I might have had about this were dispelled Monday morning. I flew to Pittsburgh where I was scheduled to speak before eight hundred delegates to a conference on urban transportation. "Jail Ford, Jail Ford," some demonstrators shouted, and a workman standing by the airport fence told reporters, "Oh, it was all fixed. He said to Nixon, 'You give me the job, I'll give you the pardon.'" I began to wonder whether, instead of healing the wounds, my decision had only rubbed salt in them.

What made the situation worse was that even some members of my staff failed to understand my motives. Talking to reporters after his resignation, terHorst referred to the

pardon as an "act of mercy." Similarly, Phil Buchen, asked by reporters why I hadn't demanded a confession of guilt by Nixon as a condition of the pardon, replied, "You do not put conditions on an act of mercy." Phil's personal reaction was one of compassion, which was fine and good. But compassion for Nixon as an individual hadn't prompted my decision at all. (Pl. Ex. 1 pp. 265-66)

* * *

The press conference gave me a chance to make a point that I wanted to underline. When a reporter asked if I planned to set up a code of ethics for the Executive Branch, I responded, "The code of ethics that will be followed will be the example that I set." But in general I was disappointed by the questions that were raised. The White House press corps didn't seem interested in finding out how I planned to deal with the substantive issues that confronted me. They just wanted to know what I was going to do about Nixon, and I thought they had wasted my time.

At the conclusion of the press conference, I walked back to the Oval Office and asked my advisers how long they thought this would go on. Was I going to be asked about Nixon's fate every time I met with the press? Each

of them said it would continue as long as Nixon's legal status and the disposition of his papers and tapes remained unclarified. Their scenario was discouraging. I'd been hoping to have press conferences every two or three weeks. I realized now that I'd have to be prepared to answer repeated questions about him and his many legal problems.

Worse, I recognized that the responses I'd already given could -- and probably would be -- variously interpreted. It would also seem to some in the press that I'd made statements that were contradictory. In response to Helen Thomas's question as to whether or not I agreed with Nelson Rockefeller that Nixon should have immunity from prosecution, I had said that I did, adding that "in the last ten days or two weeks I have asked for prayers for guidance on this very important point." But then, in response to another question, I had said that I thought the Special Prosecutor had "an obligation to take whatever action he sees fit and that should include any and all individuals." I realized those two answers seemed at variance with each other, yet I didn't know how to avoid the apparent contradiction. For me to have said that Special Prosecutor Leon Jaworski shouldn't do his duty would have been for me to tell a law enforcement officer to forget about

his oath of office, and I didn't want to make it appear that I was signaling to treat one potential defendant differently from any other.

Then, too, some of my replies seemed to commit me to waiting until after Nixon's trial and conviction before deciding what to do about his case. "In this situation," I had said, "I am the final authority. There have been no charges made, there has been no action by the courts, there has been no action by any jury. And until any legal process has been undertaken, I think it unwise and untimely for me to make any commitment." And again: "I make the final decision. And until it gets to me, I make no commitment one way or another." Clearly, the implication was that if he were convicted I was going to wait until just minutes before Nixon went to jail before -- maybe -- granting him a pardon.

All this forced me to address the issue squarely for the first time. I had to get the monkey off my back one way or another. I was already struggling with the question of who had jurisdiction over the papers and tapes, and that was becoming more and more time consuming every day, intruding into time that I needed in order to deal with the economy, the Cyprus problem, the reorganization of the White House staff, a Congress that

was rushing legislation through the mill in order to adjourn in October and an upcoming fall campaign that -- barring a miracle -- would turn out to be a disaster for Republicans. I simply couldn't listen to lawyers' endless about Nixon's tapes and documents or answer constant questions about his legal status. But just what should -- and could -- I do? (Pl. Ex. 1 pp. 234-36)

Paragraph 13

The precipitating factor in his decision was a series of secret meetings his general counsel, Phil Buchen, held with Watergate Special Prosecutor Leon Jaworski in the Jefferson Hotel, where they were both staying at the time. Ford attributes Jaworski with providing some "crucial" information -- i.e., that Nixon was under investigation in ten separate areas, and that the court process could "take years." Ford cites a memorandum from Jaworski's assistant, Henry S. Ruth, Jr., as being especially persuasive. Ruth had written:

> "If you decide to recommend indictment I think it is fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before the indictment." He went on to say: "One can make a strong argument for

> leniency and if President Ford is so inclined, I think he ought to do it early rather than late."

Manuscript

For the past several days, Buchen had also been meeting with Jaworski. Their contacts had been facilitated by the fact that both men were staying at the Jefferson Hotel. They could shuttle between floors without attracting undue attention. Jaworski never said so, but it became obvious to Phil that he thought the grand jury would indict Nixon soon. (After all, Phil remembered, the grand jury had named Nixon as an unindicted co-conspirator in the Watergate cover-up several months before.) Then, on the afternoon of September 4, Jaworski gave Phil several crucial pieces of information. The first was a letter in which he expressed his opinion as to how long it would take -- assuming Nixon was indicted -- before a trial could begin.

"The factual situation regarding a trial of Richard M. Nixon within constitutional bounds is unprecedented," the Special Prosecutor wrote. "It is especially unique in view of the recent House Judiciary Committee inquiry on impeachment, resulting in a unanimous adverse finding to Richard M. Nixon on the Article involving obstruction of

justice. The massive publicity given the hearings and the findings that ensued, the reversal of judgment of a number of the members of the Republican Party following release of the June 23 tape recording and their statements carried nationwide, and finally, the resignation of Richard M. Nixon require a delay, before selection of a jury is begun, of a period from nine months to a year and perhaps even longer. This judgment is predicated on a review of the decisions of the United States courts involving prejudicial pretrial publicity.

"The Government's decision to pursue impeachment proceedings and the tremendous volume of television, radio and newspaper coverage given thereto are factors emphasized by the courts in weighing the time [until] a trial can be had. The complexities involved in the process of selecting a jury and the time it will take to complete the process I find it difficult to estimate at this time.

"The situation regarding Richard M. Nixon is readily distinguishable from the facts involved in the case of United States v. Mitchell, et al. The defendants in the Mitchell case were indicted by a grand jury operating in secret session. They will be called to trial, unlike Richard M. Nixon, if indicted, without any

adverse finding by an investigatory body holding public hearings on its conclusions. It is precisely the condemnation of Richard M. Nixon already made in the impeachment process that would make it unfair to the defendants in the case of United States v. Mitchell, et al., for Richard M. Nixon now to be joined as a co-conspirator should it be concluded that an indictment of him was proper.

"The United States v. Mitchell, et al., trial will within itself generate new publicity, some undoubtedly prejudicial to Richard M. Nixon. I bear this in mind when I estimate the earliest time of trial of Richard M. Nixon, under his constitutional guarantees, in the event of indictment, to be as indicated above."

Shortly after four o'clock on the afternoon of September 5, Buchen and Becker came into the Oval Office and showed me Jaworski's opinion. It was worrisome. Even if a full year elapsed before a trial could begin, there was no telling how long it would last. And if the verdict was Guilty, one had to assume that Nixon would appeal. That process would take years. Of equal concern to me was a memorandum which the Special Prosecutor had attached. It was from Henry S. Ruth, Jr., Jaworski's deputy, and it listed ten areas

of investigation that prosecutors were pursuing. (Among them: tax deductions relating to the gift of Nixon's Vice Presidential papers, misuse of the IRS through attempted initiation of audits of Nixon's "enemies," and the handling of campaign contributions by Bebe Rebozo for Nixon's personal benefit.)

"None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon," Ruth's memo continued, "but I thought you ought to know which of the pending investigations were even remotely connected to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum."

Ruth, of course, had given Jaworski his own recommendations: "If you decide to recommend indictment, I think it fair and proper to notify Jack Miller and the White House sufficiently in advance so that pardon action could be taken before indictment." He went on to say: "One can make a strong argument for leniency, and if President Ford is so inclined, I think he ought to do it early rather than late." That influenced me because Ruth knew as much about Watergate as anyone. He was simply putting the nation's interests first. Which was precisely what I would have to do. (Pl. Ex. 1 pp. 246-49).

Paragraph 14

Ford decided that court proceedings against Nixon might take six years, that Nixon "would not spend time quietly in San Clemente," and "it would be virtually impossible for me to direct public attention on anything else."

Paragraph 15

Buchen, Haig and Henry Kissinger agreed with him. Hartmann was not so sure.

Manuscript

Over the next few days, I agonized over the idea of a pardon, and eventually several key conclusions solidified in my mind.

First of all, I simply was not convinced that the country wanted to see an ex-President behind bars. We are not a vengeful people; forgiveness is one of the roots of the American tradition. And Nixon, in my opinion, had already suffered enormously. His resignation was an implicit admission of guilt, and he would have to carry forever the burden of his disgrace. But I wasn't motivated primarily by sympathy for his plight or by concern over the state of his health. It was the state of the country's health at home and

around the world that worried me. As Army Major Bob Barrett, one of my military aides, said: "We're all Watergate junkies. Some of us are mainlining, some are sniffing, some are lacing it with something else, but all of us are addicted. This will go on and on unless someone steps in and says that we, as a nation, must go cold turkey. Otherwise, we will die of an overdose."

"Among the deficiencies of hindsight," Winston Churchill once wrote, "is that while we know the consequences of what was done, we do not know the consequences of some other course that was not followed." Yet I was very sure of what would happen if I let the charges against Nixon run their legal course. Months were sure to elapse between an indictment and trial. The entire process would no doubt require years: a minimum of two, a maximum of six. And Nixon would not spend time quietly in San Clemente. He would be fighting for his freedom, taking his cause to the people, and his constant struggle would have dominated the news. The story would overshadow everything else.

No other issue could compete with the drama of a former President trying to stay out of jail. It would be virtually impossible for me to direct public attention on anything

else. Passions on both sides would be aroused. A period of such prolonged vituperation and recrimination would be disastrous for the nation. America needed recovery, not revenge. The hate had to be drained and the healing begun.

Keeping all these thoughts to myself, I broached the possibility of a pardon with five key aides: Buchen, Haig, Kissinger, Hartmann and Marsh. I swore each of them to secrecy, emphasizing that there simply could not be any leaks until I had reached a decision. I urged them to give me their most candid feelings. Buchen, I knew already, was inclined to favor the idea. Haig was for it too, although he never flatly said as much. He laid out the pros and cons, then stepped back and said, "It's your decision, sir." When I talked to Kissinger at one of our private morning meetings, he said he thought it was the right thing to do. It was the quickest, really the only way to clear the center stage. The spectacle of a former President on trial would damage our country's image internationally. It was a very impressive argument.

However, Hartmann and Marsh had reservations. Neither argued its equity; nor disputed my view that this was the only way to get the matter behind us once and for all. Both simply considered it their job to present alternatives. "Mr.

President," Hartmann said, "you'll have to expect a lot of flack. No one can predict just how deep the resentment will go, but there will be strong editorial condemnation for sure. There will be all hell to pay with the news media, and the White House press corps will go up the wall."

"I know that," I replied, "but the press is going to react that way whenever I announce the decision, so it might as well be now."

Hartmann shifted to another tack. Mentioning a recent survey which showed that 56 percent of people interviewed thought Nixon ought to be tried, he warned that the pardon would damage me politically. "Your popularity in the opinion polls will be undercut because the public won't understand. I know why you want to do it, but you should be cognizant of the down side."

"I'm aware of that," I said. "It could easily cost me the next election if I run again. But damn it, I don't need the polls to tell me whether I'm right or wrong."

For Marsh the important question was the timing. He felt the country wasn't ready for it yet and urged me to delay the announcement for several weeks. When he saw he wasn't making

headway, he suggested that I lay the groundwork by notifying the key leaders on Capitol Hill and asking them to keep the secret until I decided to act. But that, I thought, would increase the possibility of a leak to the press, and a leak would be calamitous. Then Marsh mentioned something else. "Look," he said, "both of us know about the meeting with Haig that took place on Thursday, August 1 -- the meeting where he discussed a pardon as one of several options available at the time. Although you and I understand the two are not related, will people try to connect them?"

"Maybe they will, but we both know the facts," I replied. (Pl. Ex. 1 pp. 237-41)

Paragraph 16

Buchen wanted to condition the pardon on Nixon agreeing to settle the question of who would retain custody and control over the tapes and Presidential papers that might be relevant to various Watergate proceedings, but Ford was reluctant to do that.

Paragraph 17

At one point a plan was considered whereby the Presidential

materials would be kept in a vault at a Federal facility near San Clemente, but the vault would require two keys to open it. One would be retained by the General Services Administration, the other by Richard Nixon.

Manuscript

So I had the legal authority to move ahead. I hadn't made a final decision, but it must have been obvious to Phil that I was leaning toward a pardon. "Look," he said, "if you're going to do this to put Watergate behind you, I think you also ought to let me see how far we can go to get an agreement on the papers and tapes and have that in place at the same time."

"Well," I said, "if you can get the papers and tapes question settled prior to the pardon, that's fine. Let's get it behind us. But I don't want to condition the pardon on his making an agreement on the papers and tapes, and I don't want you to insist on any particular terms."

"I won't condition it," Phil replied, "but I can work it out so by his agreement it'll come out at the same time."

The issue was far more complex than it appeared. Stored in the White House and the EOB were some 950 reels

of tape and roughly 46 million pieces of paper. By both tradition and rulings by various Attorneys General, those tapes and papers were the property of the former President. (On August 22, to make doubly sure of this, I had asked Attorney General Saxbe to give me a legal opinion. "To conclude that such materials are not the property of (Nixon) would be to reverse what has apparently been the almost unvaried understanding of all three branches of the government since the beginning of the Republic," he decided, "and to call into question the practices of our Presidents since the earliest times." He recommended that I send everything out to Nixon; the members of the transition team concurred.) And Nixon wanted them desperately. He had already been served with a subpoena to appear as a witness in the trials of Mitchell, Haldeman, Ehrlichman and the other Watergate defendants. That trial was due to begin September 30. He had a legitimate need to review his records and tapes in order to prepare his testimony.

But Jaworski also had an interest in seeing the materials. So did the various Watergate defendants. Additionally, attorneys involved in a number of civil suits had issued subpoenas to the White House asking us to produce tapes and records relating to the matters under litigation in each of these separate suits.

Somehow, we had to satisfy these competing claims and do so in such a way as to reassure the public -- in light of the eighteen and one-half minute gap on one of the crucial tapes -- that nothing would be altered or destroyed.

The problem appeared to defy a solution. And, in a literally physical sense, it was getting worse. The packaging, boxing and storing of the materials was taking place on the fourth floor of the EOB. As the process continued, the Secret Service, in a confidential memorandum, expressed worry over the floor's ability to withstand the extra weight. But early in the week of August 26, the possibility of a solution emerged when Nixon retained Herbert J. ("Jack") Miller as his attorney. That at least opened an avenue of communication between Buchen and the former President that had not existed before.

After discussing the problem with Miller, Buchen and Becker came up with the concept of a Presidential deed of gift of the papers and tapes to the United States. Under this proposal, the documents would be stored at a federal facility near San Clemente. Nixon and the government would share formal ownership and the materials would be available for court subpoenas for between three and five years. To

ensure their security, two keys would be needed to open the vault. Nixon would have one, the General Services Administration the other. After five years had elapsed, Nixon could order the tapes destroyed. Miller didn't know if Nixon would accept the plan, but he would prepare a draft of a letter from the former President to GSA Administrator Arthur Sampson which he hoped expressed agreement with the concept. (Pl. Ex. 1 pp. 243-45)

Paragraph 18

The White House did, however, want Nixon to make a full confession on the occasion of his pardon or, at a minimum, express true contrition. Ford tells of the negotiation with Jack Miller, Nixon's lawyer, over the wording of Nixon's statement. But as Ford reports Miller's response, Nixon was not likely to yield. "His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent."

Manuscript

On Wednesday, September 4, Buchen and Becker met with Miller to discuss the wording of that letter. At one point, Buchen said: "President Ford is giving some consideration to pardoning your client. It's just in the consideration stage, and by no means do I

want you or your client to get excited because it's not a final decision yet." Then Phil added: "Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that would tell the world, 'Yes, he did it, and he's accepting the pardon because he's guilty.'"

Miller said he understood and volunteered his belief that if the pardon were granted, Nixon should issue a statement admitting his involvement in Watergate. But he wasn't optimistic about getting such a statement. His few meetings with his client had shown him that the former President's ability to discuss Watergate objectively was almost nonexistent. Buchen and Becker then said that if and when the pardon was issued, it would be without preconditions, that while we'd welcome a statement of contrition, we weren't demanding one. (Pl. Ex. 1 pp. 245-46)

Paragraph 19

The statement they really wanted was never forthcoming. As soon as Ford's emissary arrived in San Clemente, he was confronted with

an ultimatum by Ron Ziegler, Nixon's former press secretary. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." Ziegler proposed a draft, which was turned down on the ground that "no statement would be better than that." They went through three more drafts before they agreed on the statement Nixon finally made, which stopped far short of a full confession.

Paragraph 20

When Ford aide Benton Becker tried to explain to Nixon that acceptance of a pardon was an admission of guilt, he felt the President wasn't really listening. Instead, Nixon wanted to talk about the Washington Redskins. And when Becker left, Nixon pressed on him some cuff links and a tiepin "out of my own jewelry box."

Manuscript

Becker was the obvious choice. I had full confidence in his judgment, his legal expertise and his loyalty to me. Haig arranged for an Air Force jet to fly Becker and Miller to California. Now Phil and I reviewed Becker's mission with him. He was to negotiate an agreement covering

the papers and tapes and to review any response Nixon might give in the event I decided to pardon him. He was authorized to say, "It's not final, but in all probability, a pardon will be forthcoming." He stood up to leave, and I walked with him to the Oval Office door. I put my arm around his shoulder. "Be very firm out there and tell me what you see," I said.

The story Becker told me upon his return to Washington on Saturday was poignant. No sooner had he arrived in San Clemente very late Thursday night than Ron Ziegler had confronted him with an ultimatum. "Let's get one thing straight immediately," Ziegler said. "President Nixon is not issuing any statement whatsoever regarding Watergate, whether Jerry Ford pardons him or not." There it was, the same defiant attitude he had expressed so often during his years as press secretary, the reference to Nixon as if he still were President and the familiar, condescending use of my first name. As soon as he heard that, Becker threatened to turn around and leave; in fact, he asked Ziegler how to contact the pilot of the plane that had flown him to California. But Miller succeeded in calming both men down, and they agreed to meet the next morning.

Negotiations that day centered mainly on the papers and tapes. By

midafternoon a compromise had been reached. It gave both Nixon and the government access to the materials but stipulated that only he could authorize the Special Prosecutor or anyone else to examine them. Becker telephoned Buchen, who informed me of the details. Both of them seemed convinced that it was the best arrangement we could obtain. On their recommendations, I decided to accept it. The discussions in San Clemente then turned to the response Nixon would make if he received a pardon. The first draft that Ziegler prepared for Becker was disastrous. It spoke of the pressures of the office of the President, the necessity for reliance upon the judgment and the honesty of the White House staff and the President's preoccupation with international affairs. It concluded by acknowledging that Nixon should have delegated less authority to -- and placed less reliance on -- the members of his staff. That was all. When Ziegler asked Becker what he thought of it, Becker replied that no statement would be better than that. He stressed that although a satisfactory statement was not a pre-condition for a pardon, he thought that Ziegler could do a better job.

Ziegler went through three more drafts. In the final one, the former President said: "I have been informed that President Ford has granted me a

full and absolute pardon for any charges which might be brought against me for actions taken during the time I was President of the United States. In accepting this pardon, I hope that his compassionate act will contribute to lifting the burden of Watergate from our country.

"Here in California, my perspective on Watergate is quite different than it was while I was embattled in the midst of the controversy and while I was still subject to the unrelenting daily demands of the Presidency itself.

"Looking back on what is still in my mind, a complex and confusing maze of events, decisions, pressures and personalities, one thing I can see clearly now is that I was wrong in not acting more decisively and more forthrightly in dealing with Watergate, particularly when it reached the stage of judicial proceedings and grew from a political scandal into a national tragedy.

"No words can describe the depth of my regret and pain at the anguish of my mistakes over Watergate have caused the nation and the Presidency -- a nation I so deeply love and an institution I so greatly respect.

"I know that many fair-minded people believe that my motivations

and actions in the Watergate affair were intentionally self-serving and illegal. I now understand how my own mistakes and misjudgments have contributed to that belief and seemed to support it. This burden is the heaviest one of all to bear.

"That the way I tried to deal with Watergate was the wrong way is a burden I shall bear for every day of the life that is left to me."

Becker wasn't satisfied. It wasn't the "full confession" he'd been hoping the former President would make, and he suspected that it would fall far short of what I wanted Nixon to say. Still, reasoning that Nixon had said about as much as he was going to say he told Ziegler that he'd take the draft back to Washington and see if it would pass muster there. Then, remembering my final instructions, he asked to see Nixon personally. Ziegler refused, but Miller intervened and said he saw no harm in the meeting. "All right," Ziegler said finally, "you can go on in."

The office was very small and looked as though someone had just moved in. There were no pictures on the walls. There was just a desk flanked by the U.S. and Presidential flags. Nixon sat behind that desk and, Becker later told me, he looked terrible. He appeared to have aged

and shrunken in the month since his resignation. His jowls were loose and flabby, but his shirt seemed to be too big for his neck. Nixon didn't smoke, but his fingernails had a yellowish tint. His handshake was very weak, and Becker noticed that he wasn't wearing the customary American flag pin in the lapel of his suit. "Mr. President," Becker began, "your aides and I have accomplished some very good objectives for the nation and for you today with respect to your papers. President Ford doesn't wish to deny you your papers, nor does President Ford wish to deny access to other people."

Nixon made no response. Becker noticed that he was slouched in his chair, that the expression on his face seemed to be saying, "Leave me alone," and that he didn't seem to be following the conversation. It was almost as if he had lost the will to live. Then Becker turned to the pardon: "I'm sure that Mr. Miller and Mr. Ziegler have told you that President Ford is considering a pardon, and I know they've showed you a draft of the document. Now, there are certain things you should know about pardons, and I should satisfy myself that you do know them."

What Becker wanted to do was to explain the Burdick case of 1915 and restate the White House view that

acceptance of a pardon was an acknowledgment of guilt. But Nixon didn't seem to want to talk about that. He must have thought Becker came from Grand Rapids because he was surprised to learn that he lived in Washington. When Becker told him that, the former President asked, "How are the Redskins going to do this year?"

"I really don't know, Mr. President," Becker replied. "We have some important things to talk about. Let's talk about them." Once again he made the point that an acceptance of the pardon constituted an admission of guilt.

"Uh-huh," Nixon replied.

His attention span was short. What few remarks he made were left unfinished, in mid-sentence. After twenty minutes or so, Becker was finished with what had turned out to be a monologue. He left the office and, with Miller, waited for the car that would drive them away from San Clemente. Just then, Ziegler called him back and said that Nixon wanted to see him again.

Nixon seemed exhausted. "You've been a fine young man," he told Becker. "You've been a gentleman. We've had enough bullies." His voice faltered, and for a moment he looked away. "I want to give you something.

But look around the office. I don't have anything any more. They took it all away from me."

Becker felt very uncomfortable. "That's all right, Mr. President," he began.

"No, no, no," Nixon went on. "I asked Pat to get these for me." He opened a desk drawer and pulled out two little boxes containing cuff links and a tie pin. "She got these out of my own jewelry box," Nixon continued. "There aren't any more in the whole world. I want you to have them."

Becker took the boxes, shook Nixon's hand again and left the room as quickly as he could. Any more, he told me when he returned to Washington, and he would have broken down and started to cry himself. "I'm not a medical doctor," he told me, "but I really have serious questions in my mind whether that man is going to be alive at the time of the election."

"Well," I replied, "1976 is a long time away."

"I don't mean 1976," Becker said. "I mean 1974." (Pl. Ex. 1 pp. 249-54)

Paragraph 21

> Ultimately, Ford sums up the philosophy underlying his decision as one he picked up as a student at Yale Law School many years before. "I learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible."

Manuscript

I especially wanted it understood that my fundamental decision to grant a pardon had nothing to do with any sympathy I might feel for Nixon personally or any concern I might have for the state of his health. Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon -- and Watergate -- behind us as quickly as possible. The successful conclusion of the agreement concerning the papers and tapes together with the statement Becker had secured from Nixon persuaded me to act as soon as possible. You can't pull a bandage off slowly, and I was convinced that the sooner I issued the pardon, the better it would be for the country. I decided to make the announcement Sunday morning. (Pl. Ex. 1 p. 256)

Paragraph 22

Later, when Ford learned that Nixon's phlebitis had acted up and his health was seriously impaired, he debated whether to pay the ailing former President a visit. "If I made the trip it would remind everybody of Watergate and the pardon. If I didn't, people would say I lacked compassion." Ford went:

> "He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death."

Manuscript

Late in October, Richard Nixon's health took a turn for the worse. The phlebitis in his left leg created blood clots that threatened his life, and doctors decided to operate. After the operation he went into shock, and doctors said his condition was critical. On October 31, I flew to Los Angeles to speak at a dinner for Republican candidates at the Century Plaza Hotel. My staff debated whether or not I ought to visit Nixon at the Long Beach Hospital, only half an hour away. If I made the trip, it would remind everyone of Watergate and the

pardon. If I didn't, people would say I lacked compassion. I ended their debate as soon as I found out that it had begun. Of course I would go. Before dinner that evening, I telephoned Pat and asked how her husband was doing. "I don't want to push it," I said, "but would it help if I came down there?"

"Oh, there's nothing he'd like more," she replied.

Next morning, November 1, we helicoptered to the Long Beach airport, then drove to the hospital, where I talked to Nixon's physician, Dr. John Lundgren. The former President, Lundgren said, was a very sick man. I could see him, but I had to be very quiet, and I couldn't say anything that might upset him.

The hospital had just opened a new wing, and Nixon was the only patient there. I took the elevator to the seventh floor, where Pat, Julie and Tricia greeted me effusively. Then, with Lundgren, I stepped toward Nixon's room. An attendant tried to open the door. He couldn't. Incredibly, the lock was jammed. It wouldn't respond to our frantic efforts and we had to wait five minutes while someone fetched an expert. I shuddered to think what might have happened had Nixon taken a sudden turn for the worse.

When I stepped into the room and saw Nixon's condition, I was even more shocked than I had been by the delay in opening that door. He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen, and I thought I had never seen anyone closer to death. He opened his eyes and said, "Hi, Jerry," in a voice that was barely audible. Then we shook hands. We talked about generalities and the fall campaign. I told him the party had a good chance on election day. I wanted to tell him more, but I realized how difficult it was for him to respond to me. He couldn't keep his eyes open, and his voice was as soft as a whisper. "My own situation . . . " he said very slowly. "I'm not feeling too well, but I'm going to make it." And then, as I was preparing to leave: "Mr. President, this has meant a lot to me. I'm deeply grateful." (Pl. Ex. 1 pp. 298-99)

Paragraph 23

The manuscript made available to The Nation includes many references to Henry Kissinger and other personalities who played a major role during the Ford years.

Paragraph 24

On Kissinger. Immediately after being informed by Nixon of his intention to resign, Ford returned to the Executive Office Building and phoned Henry Kissinger to let him know how he felt. "Henry," he said, "I need you. The country needs you. I want you to stay, I'll do everything I can to work with you."

Paragraph 25

"Sir," Kissinger replied, "it is my job to get along with you and not yours to get along with me."

Paragraph 26

"We'll get along," Ford said. "I know we'll get along." Referring to Kissinger's joint jobs as Secretary of State and National Security Adviser to the President, Ford said, "I don't want to make any change. I think it's worked out well, so let's keep it that way."

Manuscript

I had heard rumors that the discussions among members of the Nixon family about resignation had been volatile, but in our meeting the President never brought it up. He had made his decision. It was over as far as he was concerned, and his only

interest now was to foster a smooth and orderly transition. After seventy minutes we had touched every base and it was time for me to leave. As we walked toward the doors, Nixon put his arm around me. "Here's an old friend who's made a major decision changing both our lives," I said to myself. "Now he's wishing me the best not only for myself but for the country." I couldn't be very eloquent because my emotions were too strong. There was a choking in my throat.

"Well," I said, "I'll see you tomorrow. Give Pat and the family my best." Even those low-key words didn't come out easily.

"You and Betty will enjoy living in the mansion," the President replied. "We'll see you tomorrow."

We shook hands again, and I walked the forty yards to the limousine waiting in the driveway. I never once glanced back. Nor did I look at the Secret Service agents accompanying me, because I was afraid my feelings might show. I stared ahead at the car, and I wanted the agents to open the door as soon as possible so I could climb inside. I needed to be alone.

But that, I knew, would be impossible, for there were still too

many things to do. As soon as I returned to the EOB, I telephoned Kissinger. I thought it was urgent to tell him right away how I felt about him. "Henry," I said when he came on the line, "I need you. The country needs you. I want you to stay. I'll do everything I can to work with you."

"There will be no problem," he replied in his deep, accented voice. "Sir, it is my job to get along with you and not yours to get along with me."

"We'll get along," I said. "I know we can get along." We talked about the two hats he wore, as Secretary of State and National Security Adviser to the President. "I don't want to make any change," I said. "I think it's worked out well, so let's keep it that way." (Pl. Ex. 1 pp. 45-46)

Paragraph 27

Later Ford did make the change and relieved Kissinger of his responsibilities as National Security Adviser at the same time that he fired James Schlesinger as Secretary of Defense. Shortly thereafter, he reports, Kissinger presented him with a "draft" letter of resignation, which he said Ford could call upon at will if he felt he needed it to quiet

dissent from conservatives who objected to Kissinger's role in the firing of Schlesinger.

Manuscript

One of the recommendations that the transition team gave me after I became President was that Henry Kissinger should wear only one hat; to expect him to function effectively both as Secretary of State and as National Security Adviser to the President was to ask too much of any one man. At the time, I hadn't gone along with that view. Henry wanted to keep both positions, and I didn't want to make any changes that might be misunderstood overseas. Over the next 15 months, however, I became convinced that Henry ought to concentrate on the Department of State and foreign policy; he shouldn't have to worry about the mechanics of the NSC.

Those concerns, I thought, belonged rightfully to Air Force Lieutenant General Brent Scowcroft, who for nearly three years had served as deputy national security adviser to the President. Although he was a West Point graduate, Scowcroft hardly fit the Hollywood stereotype of a fighting man. He was thin, short and balding. Unfailingly polite, he never raised his voice. If he was really upset about something, he might say, "Gosh," but that was the strongest four-letter

word I had ever heard him use. He didn't smoke or drink. Yet his unremarkable appearance and mild manner belied a fine service record and a first-rate intellect. He had worn a fighter pilot's wings since 1948; he had earned a master's degree and a Ph.D. in international relations at Columbia. He had taught Soviet history at West Point, and he spoke both Russian and Serbian. He and Henry thought alike. I knew that their excellent relationship would continue even after I asked Brent to wear Henry's second hat. (Pl. Ex. 1 pp. 491-92)

* * *

On Saturday afternoon, October 25, I called Kissinger and Rumsfeld into the Oval Office and explained what I wanted to do. The only way I could feel comfortable with my own team in place, I said, was to fire Schlesinger, ask Colby to submit his resignation, bring Bush back as director of the CIA, send Rumsfeld over to Defense, take away one of Kissinger's two hats and upgrade both Cheney and Scowcroft.

Both Kissinger and Rumsfeld seemed stunned by the sweeping nature of the changes. Both expressed doubts. I was firing Schlesinger only because of my personal animosity toward him, Henry said. The political

price that I would have to pay would be exorbitant. Therefore, it would be wiser to keep him on for another year. He didn't object to losing his job as National Security Adviser to the President, but he did think it might be misunderstood in foreign capitals. If other countries thought I was downgrading him, it would jeopardize his ability to function effectively as my Secretary of State.

Rumsfeld expressed similar reservations about the many changes. My own credibility was at stake, he pointed out. I had said publicly that my Cabinet was set. Now here I was about to fire Schlesinger. He was equally unhappy about my decision to send him over to Defense.

I replied affirmatively to each of these objections. Defense, I told Rumsfeld, was the place he ought to go. With his experience and ability, he could convince Congress to appropriate necessary funds for the military. At the end of the meeting, Henry said he would accept my decisions. Rumsfeld wanted to think it over and talk with me the next day. (Pl. Ex. 1 pp. 494-95)

* * *

While I was defending the budget Henry Kissinger was in Moscow making another attempt to reach agreement

on SALT II. We were also seeking to get the Soviets to reduce their involvement in the Angolan civil war. Both of us were aware that this would probably be our last chance to achieve an arms accord in 1976. As the nomination and election approached, partisanship would flourish, making it impossible to discuss complex issues like SALT in a rational way. So Henry really wanted the Moscow talks to succeed. For a variety of reasons, most of them unfair, he had been going through exceedingly difficult times. Early in January, in fact, he had come into the Oval Office and handed me a "draft" of his letter of resignation as Secretary of State. His motivation, he explained, was political. Conservatives still blamed him for my dismissal of Schlesinger, although he had had nothing to do with it. That made him a liability to me in an election year. Unselfishly, in order not to embarrass me, he would step aside. Pointing to the letter, he said, "This is what I'll send you if my resignation will help."

I was shocked by the idea. His resignation was something I simply couldn't accept. The country needed him -- I needed him -- to implement our foreign policy at this difficult time. (Pl. Ex. 1 pp. 536-37)

Paragraph 28

On John Connally. When Ford was informed that Nixon wanted him to replace Agnew, he told the President he had "no ambition to hold office after January 1977." Nixon replied that that was good since his own choice for his running mate in 1976 was John Connally. "He'd be excellent," observed Nixon. Ford says he had "no problem with that."

Manuscript

On Thursday morning, October 11, Nixon met with the Congressional leadership to discuss the procedures that he wanted to follow in making his nomination. "I'd like to be in the shape with the American public that Jerry Ford is," he joshed, but I didn't take him seriously. Next morning, however, Haig asked me to come to the Oval Office at eleven o'clock. Hugh Scott accompanied me. He had also received a call, so I assumed that Nixon had some legislative matter that he wanted to discuss. Usually, Scott and I saw the President together, so I was surprised when Haig ushered Scott into the Oval Office alone and asked me to wait outside the door. Minutes later, Scott left; I entered and took the chair to the President's right.

Nixon came directly to the point. Because of the Agnew tragedy, he said, there was an urgent need to restore public confidence in the office of Vice President. He wanted me to be his nominee. Then he asked if I'd made any political plans. I told him about my promise to Betty and said that I had no ambitions to hold office after January 1977. Just because I'd be serving as Vice President for the remainder of his term didn't mean I'd expect to be the Presidential nominee in 1976.

"Well, that's good," Nixon replied, "because John Connally is my choice for 1976. He'd be excellent."

"That's no problem as far as I'm concerned," I said, and told him about my discussions with Connally in Palm Springs several months before. (Pl. Ex. 1 pp. 155-56)

Paragraph 29

On the Decision to Run Again. Ford was, he tells us, so sincere in his intention not to run again that he thought he would announce it and enhance his credibility in the country and the Congress, as well as keep the promise he had made to his wife, Betty.

Paragraph 30

Kissinger talked him out of it. "You can't do that. It would be disastrous from a foreign policy point of view. For the next two and a half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President."

Manuscript

At about the same time that I was changing Nelson's future political plans, I was also altering my own. Bearing in mind my promise to Betty that I would retire in January 1977, as well as the statements I'd made during my confirmation hearings on Capitol Hill, I was giving serious thought to announcing once again that I would not be a candidate in 1976. If I did that, I thought, my credibility would be enhanced in both Congress and the country at large, and none of the tough decisions that I had to make could be challenged on political grounds. This very logical scenario dismayed Henry Kissinger.

"Mr. President," he said, "you can't do that. It would be disastrous from a foreign policy point of view. For the next two and one-half years foreign governments would know that they were dealing with a lame-duck President. All our initiatives would be dead in the water, and I wouldn't be able to implement your foreign policy. It would probably have the same consequences in dealing with the Congress on domestic issues. You can't reassert the authority of the Presidency if you leave yourself hanging out on a dead limb. You've got to be an affirmative President. You've got to hold off on any announcement like that."

Henry was right. The moment I said I wasn't going to run, the succession struggle would start. That would be divisive in and of itself, and what the country needed was a period of stability. Besides, I relished the challenge of the Presidency, and both Betty and I found that we enjoyed living in the White House -- our clothes and household effects had been moved in during our Chicago trip -- more than we ever thought we would. So on August 21, I authorized Jerry terHorst to tell reporters that I probably would run in 1976. The decision wasn't final then -- I still had Betty to convince -- but the statement enabled me to shed the image of a

caretaker chief executive and to act more persuasively on my own. (Pl. Ex. 1 pp. 216-17)

Paragraph 31

On David Kennerly, the White House photographer. Schlesinger was arguing with Kissinger and Ford over the appropriate response to the seizure of the Mayaguez. At issue was whether airstrikes against the Cambodians were desirable; Schlesinger was opposed to bombings. Following a lull in the conversation, Ford reports, up spoke the 30-year-old White House photographer, David Kennerly, who had been taking pictures for the last hour.

Paragraph 32

"Has anyone considered," Kennerly asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by?" Nobody, apparently, had considered it, but following several seconds of silence, Ford tells us, the view carried the day. "Massive airstrikes would constitute overkill," Ford decided. "It would be far better to have Navy jets from the Coral Sea make surgical strikes against specific targets."

Manuscript

At 3:52 on Wednesday afternoon, I convened the fourth and final meeting of the NSC. Mayaguez remained at anchor off Koh Tang island, and we had no new information as to the whereabouts of the crew. Some crewmen, we had to assume, remained aboard ship. Some may have been on the island, while others had been taken to the mainland. Our naval forces now were very close to the scene. Our destroyer escort, Holt, was only a mile or so away. The destroyer Wilson was approaching fast, and Coral Sea was close enough to launch air strikes on the mainland. Air Force General David Jones led off by reviewing the various options on his charts. They ranged all the way from a minimum use of force -- helicoptering Marines to Koh Tang to rescue Mayaguez and her crew and then withdrawing them as soon as possible -- to a maximum display: rescuing the ship and her crew and then "punishing" Cambodia by airstrikes.

And this is where Kissinger and I disagreed with Schlesinger. Our first consideration, of course, was the recovery of the ship and her crew. But Henry and I felt that we had to do more. We didn't want the Cambodians to be in a position to reinforce Koh Tang island once our attack began. We wanted them to know

that we meant business, so we opted for air strikes against the mainland as well. Schlesinger agreed that our first priority should be to rescue the ship and her crew, but he was far less eager to use Mayaguez as an example for Asia and the world. He was concerned that our bombing plans were too extensive. There was a lull in the discussion. Then, from the back of the room, a new voice spoke up. It was Kennerly, who had been taking pictures of us for the past hour or so. Never before during a meeting of this kind had he entered the conversation; I knew he wouldn't have done so now unless what he had to say was important so I listened carefully.

"Has anyone considered," he asked, "that this might be the act of a local Cambodian commander who has just taken it into his own hands to stop any ship that comes by? Has anyone stopped to think that he might not have gotten his orders from Phnom Penh? If that's what has happened, you know, you can blow the whole place away and it's not gonna make any difference. Everyone here has been talking about Cambodia as if it were a traditional government. Like France. We have trouble with France, we just pick up the telephone and call. We know who to talk to. But I was in Cambodia just two weeks ago, and it's not that kind of government at all.

We don't even know who the leadership is. Has anyone considered that?"

For several seconds there was silence in the Cabinet Room. Everyone seemed stunned that this brash photographer who was not yet thirty years old would have the guts to offer an unsolicited opinion to the President, the Vice President, the Secretaries of State and Defense, the Director of the CIA and the Acting Chairman of the Joint Chiefs of Staff. Yet I wasn't surprised, and I was glad to hear his point of view.

The discussion resumed about what our reaction should be. In the event that carrier aircraft couldn't reach their targets on time, B-52 crews on Guam had been placed on alert. Rockefeller favored giving the B-52's the go-ahead. Kissinger preferred carrier strikes if the planes were available, but he was adamant about the need for a strong response. So was Scowcroft. Schlesinger didn't seem to want any bombing at all, either by the B-52's or by the Navy Carrier aircraft. JCS Chairman General S. Brown wanted to hit the mainland, but he didn't want to use the B-52s. The decision was up to me. Subjectively, I felt that what Kennerly had said made a lot of sense. Massive airstrikes would constitute overkill. It would be far better to have Navy jets from

Coral Sea make surgical strikes against specific targets in the vicinity of Kompong Som.

Slightly more than an hour after the meeting began, I started issuing the orders. Holt was to seize and secure Mayaguez. Marines were to attack Koh Tang island, rescue crew members there and destroy any Cambodian units that got in the way. Coral Sea was to launch four air strikes against military installations near Kompong Som, including an oil depot, railroad marshaling yards and the airfield at Ream. The first of these attacks was to occur at 8:45 P.M. E.D.T., to coincide with the estimated time of the capture of the ship. (Pl. Ex. 1 pp. 414-17)

Paragraph 33

On Nixon's Character. Nixon's flaw, according to Ford, was "pride." "A terribly proud man," writes Ford, "he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)"

Paragraph 34

Nixon felt disdain for the Democratic leadership of the House, whom he also regarded as weak. According to Ford, "His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong," all of which leads Ford to wonder whether Nixon had known in advance about Watergate.

Paragraph 35

On hearing Nixon's resignation speech, which Ford felt lacked an adequate plea for forgiveness, he was persuaded that "Nixon was out of touch with reality."

Manuscript

In writing about a friend, one likes to consider the mutual bonds and good qualities on which the friendship is based. One of our strongest ties was the fact that we came from Middle America (economically if not geographically), and from families that had suffered much during the Depression years. We respected each other because each of us knew that the other had come up the hard way. Both of us were lawyers; both had served as naval officers during World War II. We had similar interests aside from politics:

football, baseball and other sports. Each of us had a wonderful wife and fine children. We understood each other's ambitions in politics -- his to become President of the United States, mine to be elected Speaker of the House. And all the while, our friendship was strengthened by our mutual adherence to the same basic policies both at home and abroad.

Nixon had a brilliant mind, a great sensitivity to the public's political mood and a unique ability to analyze foreign policy issues and act decisively on them. Big decisions were his cup of tea, and his batting average was excellent. But he abhorred details, and rather enjoyed pushing them off on subordinates. And that, it seemed to me, was one of several reasons why he now had to resign.

With all his experience in giving speeches and press conferences, one might have assumed that he was an extrovert. In fact, the opposite was true. He was very shy, a loner in many respects, and he seemed to prefer dealing with paperwork to dealing with people. His oratorical capabilities were the result of his recognition that in order to succeed in politics, he had to be able to speak convincingly before large audiences. His fierce determination and able mind

propelled him toward the highest office in the land.

Most of us have hidden flaws or personality quirks that seldom come to the surface. We control them successfully and resist their exploitation by those around us. In Nixon's case, that flaw was pride. A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt were soft and expedient. (Curiously, he didn't feel that the press was weak. Reporters, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.) He was very bitter about members of Congress who wanted to cut and run from our obligations in South Vietnam, and he detested those lawmakers who were trying to hamstring his efforts to settle the war from a position of strength. He felt that ever since the days of House Speakers Sam Rayburn and John McCormack and Senate Majority Leader Lyndon Johnson, the Democratic leadership of the Congress had been eroding. Because it had become inherently weak, it was deserving of his contempt. That attitude was reflected in his selection of Bob Haldeman and John Ehrlichman as the White House aides through whom he wanted to deal with the Hill.

It was reflected, too, in his explanations of Watergate. His pride

and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. What some journalists called the "dark side" of his personality had prevailed over his judgment, which was normally sound. And once the course had been set, there was no turning back.

As I sat in our family room I wondered whether he had known in advance about the break-in at the Watergate. I couldn't really believe that he had. The new tapes, however, revealed that he had found out about it soon afterward. And I could see why he felt trapped in a dilemma. Some of the people involved -- John Mitchell, for example, were friends of his, and he didn't want to force them to pay the consequences. His pride was stronger than his recognition that he had made a mistake. He viewed admitting the truth as a sign of weakness, and that was another mistake. (Pl. Ex. 1 pp. 52-54)

* * *

Precisely at nine o'clock, the familiar face appeared on our TV screen. "Good evening," the President began. "This is the thirty-seventh time that I have spoken to you from this office where so many decisions have been made that shaped the history of this nation. . . . Throughout

the long and difficult period of Watergate, I have felt it was my duty to persevere, to make every possible effort to complete the term of office to which you elected me. In the past few days, however, it has become evident to me that I no longer have a strong enough political base in the Congress to justify continuing that effort.

"As long as there was such a base, I felt strongly that it was necessary to see the constitutional process through to its conclusion; that to do otherwise would be unfaithful to the spirit of that deliberately difficult process and a dangerously destabilizing precedent for the future.

"But with the disappearance of that base, I now believe that the constitutional purpose has been served and there is no longer a need for the process to be prolonged.

"I would have preferred to carry through to the finish whatever the personal agony it would have involved, and my family unanimously urged me to do so.

"But the interest of the nation must always come before any personal considerations. From the discussions I have had with Congressional and other leaders, I have concluded that

because of the Watergate matter, I might not have the support of the Congress that I would consider necessary to back the very difficult decisions and carry out the duties of this office in the way the interests of the nation would require.

"I have never been a quitter.

"To leave office before my term is completed is abhorrent to every instinct in my body. But as President, I must put the interest of America first.

"America needs a full-time President and a full-time Congress, particularly at this time with problems we face at home and abroad.

"To continue to fight through the months ahead for my personal vindication would almost totally absorb the time and attention of both the President and the Congress in a period when our entire focus should be on the great issues of peace abroad and prosperity without inflation at home.

"Therefore, I shall resign the Presidency, effective at noon tomorrow.

"Vice President Ford will be sworn in as President at that hour in this office. . . .

"I regret deeply any injuries that may have been done in the course of the events that led to this decision. I would say only that if some of my judgments were wrong -- and some were wrong -- they were made in what I believed at the time to be the best interests of the nation. . . ."

The speech lasted fifteen minutes, and at the end I was convinced that Nixon was out of touch with reality. The fact that he was linking his resignation to the loss of his Congressional base shocked me then and disturbs me still. If he had been more contrite and asked the American people for forgiveness, he would have received a warmer response. Yet he couldn't take that final step, I'm convinced he thought what he said was enough. (Pl. Ex. 1 pp. 55-57)

Paragraph 36

In February of last year, when The Washington Post obtained and printed advance excerpts from H.R. Haldeman's memoir, The Ends Of Power, on the eve of its publication by Times Books, The New York Times called The Post's feat "a second-rate burglary."

Paragraph 37

The Post disagreed, claiming that its coup represented "first-rate enterprise" and arguing that it had

burglarized nothing, that publication of the Haldeman memoir came under the Fair Comment doctrine long recognized by the courts, and that "There is a fundamental journalistic principle here -- a First Amendment principle that was central to the Pentagon Papers case."

Paragraph 38

In the issue of The Nation dated May 5, 1979, our special Spring Books number, we will discuss some of the ethical problems raised by the issue of disclosure.

Manuscript

[None]

ADDENDUM C TO DEFENDANTS' POST-TRIAL MEMORANDUM

Comparison of President Ford's Testimony Before the Hungate Committee with Portions of the Manuscript of "A Time to Heal"

THE MANUSCRIPT	THE TESTIMONY
Fifteen minutes later, Haig arrived at my office on the second floor of the Executive Office Building. . . . [O]ther tapes were scheduled to be delivered to Sirica on Monday, August 5. And those others were the ones that bothered Haig. . . . The new tapes, he said, contained evidence that would contradict Nixon's version of events in the Watergate scandal. . . . And if those transcripts contained the evidence that he'd been told they would, then the President's chances of escaping impeachment in the House of Representatives -- and conviction in	In the early morning of Thursday, August 1, 1974, I had a meeting in my vice presidential office, with Alexander M. Haig, Jr., Chief of Staff for President Nixon. At this meeting, I was told in a general way about fears arising because of additional tape evidence scheduled for delivery to Judge Sirica on Monday, August 5, 1974. I was told that there could be evidence which, when disclosed to the House of Representatives, would likely tip the vote in favor of

THE MANUSCRIPT	THE TESTIMONY
the Senate -- would disappear. (pp. 1-3)*	impeachment. (p. 93)**
Shortly after noon that day, I drove to Capitol Hill. No sooner had I entered my office off the Senate floor than Haig telephoned again. He wanted another meeting as soon as possible	Then shortly after noon, General Haig requested another appointment as promptly as possible. He came to my office about 3:30 p.m. for a meeting that was to last for approximately three-quarters of an hour. Only then did I learn of the damaging nature of a conversation on June 23, 1972, in one of the tapes which was due to go to Judge Sirica
When Haig appeared at 3:30 that afternoon, he looked even more beaten and harassed than he had earlier. Since our morning meeting, he had	

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* Citiations are to Pl.Ex. 1, the manuscript of "A Time To Heal."

** Citations are to Deft.Ex. B, Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Justice of House Comm. on the Judiciary, 93rd Cong., 2d Sess. at 90-151 (1974).

THE MANUSCRIPT	THE TESTIMONY
either read the transcripts or heard them discussed in great detail. The tapes made clear that Nixon knew the whole story on June 23, 1972. And when that evidence became public, Nixon's case would disintegrate. In moments of stress, Haig proceeds very deliberately, choosing his words with great care. Now he came to the point: "Are you ready, Mr. Vice President, to assume the Presidency in a short period of time?" (p. 4)	the following Monday. . . . . the critical evidence on the tape of June 23, 1972. General Haig told me he had been told of the new and damaging evidence by lawyers on the White House staff who had firsthand knowledge of what was on the tape. The substance of his conversation was that the new disclosure would be devastating, even catastrophic, insofar as President Nixon was concerned. Based on what he had learned of the conversation on the tape, he wanted to know whether I was prepared to assume the Presidency within a very short period of time. (pp. 93-94)

THE MANUSCRIPT

Carefully, Haig laid out the options that the "knowledgeable people" on the White House staff had agreed were still available to the President. (p. 304)

The first was that he could try to "ride it out" by letting impeachment take its natural course through the House and the Senate trial, fighting against conviction all the way. His second option was to resign. (p. 304)

THE TESTIMONY

General Haig outlined for me President Nixon's situation as he saw it and different views in the White House as to the courses of action that might be available, and which were being advanced by various people around him on the White House staff. As I recall there were different courses being considered: (p. 93)

(1) Some suggested "riding it out" by letting the impeachment take its course through the House and the Senate trial, fighting all the way against conviction.

(2) Others were urging resignation sooner or later. I was told some people backed the first course

THE MANUSCRIPT

Here the number of alternatives increased. Under provisions of the 25th Amendment to the Constitution, he could step aside temporarily. He could delay his resignation until further along in the impeachment process. He could try to settle for a censure vote in the Congress. He could pardon himself and everyone else involved in Watergate and then resign. Finally, Haig said that according to some on Nixon's White House staff, Nixon could agree to leave in return for an agreement that the new President -- Gerald Ford -- would pardon him. (p. 5)

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and other people a resignation. . . . (p. 94)

On the resignation issue, there were put forth a number of options which General Haig reviewed with me. As I recall his conversation, various possible options being considered included:

(1) The President temporarily step aside under the 25th Amendment.

(2) Delaying resignation until further along the impeachment process.

(3) Trying first to settle for a censure vote as a means of avoiding either impeachment or a need to resign.

(4) The question of whether

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the President could pardon himself.

(5) Pardoning various Watergate defendants, then himself, followed by resignation.

(6) A pardon to the President himself, should he resign. (p. 93)

[H]e made it very clear that he wasn't recommending any one option over another. . . . Next he asked if I had any suggestions as to courses of action for the President. . . . Because of his references to pardon authority, I did ask Haig about the extent of a President's pardon power.

"It's my understanding from a White House lawyer," Haig replied, "that a President does have authority to

General Haig wanted my views on the various courses of action as well as my attitude on the options of resignation. However, he indicated he was not advocating any of the options. I inquired as to what was the President's pardon power, and he answered that it was his understanding from a White House lawyer that a President did have the authority to grant

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grant a pardon even before criminal action has been taken against an individual." He didn't name the lawyer. Nor did he say whether or not that authority existed before the individual had been indicted. (pp. 5-6)

a pardon even before any criminal action had been taken against an individual, but obviously, he was in no position to have any opinion on a matter of law. (pp. 94-95)

"Well, Al," I replied, "I want some time to think. I want to talk to St. Clair and to Betty." (p. 6)

I told General Haig I had to have some time to think. Further, that I wanted to talk to James St. Clair. I also said I wanted to talk to my wife before giving any response. (p. 95)

Shortly after 8 o'clock the next morning, I met with James St. Clair. . . .

"What's your assessment now?"

"Probably the same as yours," he

Shortly after 8 o'clock the next morning, James St. Clair came to my office. Although he did not spell out in detail the new evidence, there was no question in my mind that he

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said. "Unquestionably, this will lead the House to impeach the President. It'll lead the Senate to convict him. The only question now is: What does he do? Resign or fight it through?"	considered these revelations to be so damaging that impeachment in the House was a certainty and conviction in the Senate a high probability. When I asked Mr. St. Clair if he knew of any other new and damaging evidence besides that on the June 23, 1972, tape, he said "No." (p. 95)
Neither one of us could know his answer then. Quickly I asked St. Clair, "Do you know of any other new or damaging evidence besides what's on the June 23 tapes?"	
"No," he replied. (pp. 14-15)	
Then I told him about the options that Haig had mentioned to me the afternoon before. St. Clair listened quietly, commenting only that he had not been the source of any White House staff opinion about a President's power	When I pointed out to him the various options mentioned to me by General Haig, he told me he had not been the source of any opinion about Presidential pardon power. (p. 95)

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to issue pardons. (p. 15)	
We agreed that the only thing I could do would be to call Haig in the presence of witnesses and button this thing down. Minutes later, Haig was on the line. I had written out in longhand what I wanted to say to him, and I read it slowly so that there could be no ambiguities. "I want you to understand," I said, that I have no intention of recommending what the President should do about resigning or not resigning and that nothing we talked about yesterday afternoon should be given any consideration in whatever decision the President may wish to make."	I decided I should call General Haig the afternoon of August 2. I did make the call late that afternoon and told him I wanted him to understand that I had no intention of recommending what President Nixon should do about resigning or not resigning, and that nothing we talked about the previous afternoon should be given any consideration in whatever decision the President might make. General Haig told me he was in full agreement with this position. (p. 95)

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"I think your position is exactly correct," Haig said. (p. 19)

Of equal concern to me was a memorandum which the Special Prosecutor had attached. It was from Henry S. Ruth, Jr., Jaworski's deputy, and it listed ten areas of investigation that prosecutors were pursuing. . . .

"None of these matters at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon," Ruth's memo continued, "but I thought you ought to know which of the pending investigations were even remotely connected

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I saw on or shortly after September 4, a copy of a memorandum prepared for Special Prosecutor Jaworski by the Deputy Special Prosecutor, Henry Ruth. A copy of this memorandum had been furnished by Mr. Jaworski to my counsel. . . .

The memorandum lists matters still under investigation which "may prove to have some direct connection to the activities in which Mr. Nixon is personally involved." The Watergate coverup is not included in this list; and the alleged coverup

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to Mr. Nixon. Of course, the Watergate cover-up is the subject of a separate memorandum." (p. 248)

I simply was not convinced that the country wanted to see an ex-President behind bars. We are not a vengeful people; forgiveness is one of the roots of the American tradition. (p. 238)

No other issue could compete with the drama of a former President trying to stay out of jail. It

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is mentioned only as being the subject of a separate memorandum not furnished to me. Of those matters which are listed in the memorandum, it is stated that none of them "at the moment rises to the level of our ability to prove even a probable criminal violation by Mr. Nixon." (p. 96)

I believed the general view of the American people was to spare the former President from a criminal trial. (p. 97)

Shortly afterwards I became greatly concerned that if Mr. Nixon's prosecution and trial were pro-

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would be virtually impossible for me to direct public attention on anything else. Passions on both sides would be aroused. A period of such prolonged vituperation and recrimination would be disastrous for the nation. America needed recovery, not revenge. The hate had to be drained and the healing begun. (pp. 238-239)	longed, the passions generated over a long period of time would seriously disrupt the healing of our country from the wounds of the past. I could see that the new administration could not be effective if it had to operate in the atmosphere of having a former President under prosecution and criminal trial. (p. 97)
Then Phil added: "Look, I think it's important that there be a statement of true contrition from the former President. The President tells me we can't dictate that statement, but in the interests of both your client and the President, I hope you would persuade your client to develop something that	I asked for no confessions or statement of guilt; only a statement in acceptance of the pardon when it was granted. No language was suggested or requested by anyone acting for me, to my knowledge. My counsel advised me that he had told the attorney for Mr. Nixon that

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would tell the world, 'Yes, he did it, and he's accepting the pardon because he's guilty.'"	he believed the statement should be one expressing contrition, and in this respect I was told Mr. Miller concurred. (p. 98)
Miller said he understood and volunteered his belief that if the pardon were granted, Nixon should issue a statement admitting his involvement in Watergate. (p. 246)	

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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

vs.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the First Amendment require that the scope of copyright protection for a work of non-fiction be narrowed?

2. Does the First Amendment prevail over Copyright in a fair use case, where the copyrighted material allegedly published in the name of harvesting knowledge was in fact soon to be published by the copyright owner?

3. Should a court, in a fair use case, give weight to the facts that the material taken was from an unpublished manuscript and that the use was non-productive?

THE PARTIES

The parties before this Court are those set forth in the caption.*

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* Pursuant to Rule 28.1 of the Rules of the Supreme Court: Petitioner Harper & Row, Publishers, Inc. states that it has no corporate parent and that other than Fitzhenry & Whiteside Ltd., a Canadian corporation, it has no subsidiaries or affiliates (other than wholly-owned subsidiaries). Petitioner The Reader's Digest Association, Inc. states that it has no corporate parent and no publicly-owned subsidiaries or affiliates.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reported at 723 F.2d 195 (2d Cir. 1983), and are annexed to the Petition for Certiorari as Appendix A. The District Court opinion is reported at 557 F. Supp. 1067 (S.D.N.Y. 1983) and is annexed to the Petition for Certiorari as Appendix B. The District Court's Supplemental Findings of Fact and Conclusions of Law, not reported, are annexed to the Petition for Certiorari as Appendix C.

JURISDICTION

The opinion and order of the Court of Appeals was entered on November 17, 1983. A timely petition for rehearing and rehearing *en banc* was denied on January 4, 1984, and this Petition for Certiorari was filed within 90 days of that date. The order denying rehearing is annexed to the Petition for Certiorari as Appendix D. The Petition for Certiorari was granted on May 29, 1984.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I Sec. 8 of the Constitution provides that:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The First Amendment to the Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 102 of the Copyright Revision Act of 1976, 17 U.S.C. § 102 (1982), provides that:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or

> with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
>
> (2) musical works, including any accompanying words;
>
> (3) dramatic works, including any accompanying music;
>
> (4) pantomimes and choreographic works;
>
> (5) pictorial, graphic, and sculptural works;
>
> (6) motion pictures and other audiovisual works; and
>
> (7) sound recordings.
>
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. § 106 (1982), provides that:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pic-

tures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Section 107 of the Copyright Revision Act of 1976, 17 U.S.C. § 107 (1982), provides that:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE CASE

Petitioners Harper & Row, Publishers, Inc. ("Harper & Row") and The Reader's Digest Association, Inc. ("Reader's Digest") are the owners of the publication rights to "A Time to Heal," the memoirs of former President Gerald R. Ford. Shortly before publication of this book, Respondents, Nation Enterprises and

The Nation Associates, Inc. ("the *Nation*") received a copy of the manuscript from a clandestine source. Quickly copying from the unpublished work, and without adding independent commentary, the *Nation* published in their weekly magazine an article entitled "The Ford Memoirs-Behind the Nixon Pardon." The *Nation* had ascertained the memoirs' book publishing schedule, and knew their article would be appearing just two weeks before *Time* was to print licensed excerpts. Petitioners brought suit in Federal district court for copyright infringement under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* and 28 U.S.C. § 1338(a) (1982).

After a bench trial, the District Court held that the *Nation* article quoted and paraphrased Mr. Ford's copyrightable expression, and that the fair use doctrine did not exonerate defendants' copying.

The Court of Appeals for the Second Circuit reversed in a 2-1 decision. The majority opinion (Kaufman, J.) held that most of the material quoted and paraphrased by the *Nation* was not protectible under the copyright laws and that the balance of the copying was permissible under the fair use doctrine.

STATEMENT OF FACTS

The Ford Manuscript

On February 28, 1977 former President Ford entered into a publishing contract with plaintiffs, granting them the exclusive rights to publish and sell his memoirs in book form and to license the right to publish excerpts in newspapers or periodicals prior to book publication. (Findings 6-7, C 5-6)[1]

---

[1] The following abbreviations are used:

Ja___ Joint Appendix, at the page indicated.

A___, B___, C___, D___, E___ Appendix __(A, B, C, D, or E) to the Petition for Certiorari, at the page indicated.

President Ford hired an experienced writer, Trevor Armbrister, to assist him in preparing his memoirs, and they worked together on them for approximately two years. Mr. Ford intended the memoirs to be as informal as possible, based upon his own recollections and without reliance on documents. Armbrister felt the memoirs should be very human and reflect the personal side of Ford's public service. (Findings 9-10, C 6-7).

Armbrister participated in over 200 2-hour taped interviews with Ford which were transcribed in 3,600 legal sized pages. Both participants spent considerable time preparing for the interviews, and Ford drafted "word portraits" of major figures and essays on various subjects. (The latter included Ford's perception of Nixon's character copied almost verbatim by the *Nation*). Armbrister also conducted 2,600 legal sized pages of taped interviews with numerous other people, including Alexander Haig, Nelson Rockefeller, Henry Kissinger and President Ford's aides. These were used to check and stimulate Mr. Ford's recollections and reconstruction. (Findings 10-15, C 7-10; Armbrister, TR, R. Vol. 1, A 123, 184-85, 218-19; E 38-39).

Armbrister completed a first draft in February 1979. President Ford reviewed, edited and then revised the initial typescript. Three further, complete word-for-word editing sessions involving President Ford, Armbrister and others occurred, with the former President personally making many changes in each draft. President Ford's March 1979 changes in the galleys were so extensive that one of the editors described it as a "rewriting." (Findings 17-19, C 11-12).

The manuscript, which used the former President's own words from the Ford-Armbrister dialogues, had Mr. Ford's full and

---

R. Vol. ___, ___	The indicated volume of the record on appeal before the Court of Appeals, at the page indicated.
Findings	Findings of Fact and Conclusions of Law of The District Court, Reproduced in Appendix C to the Petition for Certiorari.
PTX___	Plaintiffs' trial exhibit ___.
DTX___	Defendants' trial exhibit ___.
TR	Trial transcript.
Dep.	Deposition.

final approval of the selection and arrangement of all of its contents, as well as of the language employed. (Finding 20, C 11-12).

The Author's Agreements with Harper & Row and Reader's Digest

An exhibit to the publishing contract stated that Mr. Ford's memoirs would:

> describe in close personal terms Mr. Ford's experiences when he became Vice-President, and then President, of the United States. Within the bounds of good taste and personal loyalties, this account will present significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon, including Mr. Nixon's reactions to the crisis arising from the Watergate break-in; (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford; and (3) Mr. Ford's reflections on this period of history, and the morality and personalities involved. (Finding 21, C 14-15).

In the contract Ford also acknowledged that the value of the rights granted would be substantially diminished by his public discussion of the "unique information not previously disclosed" about his career and personal life and that he would "endeavor" not to disseminate any of such information. However, the agreement also provided: "Spontaneous and brief statements by Author in response to reporters shall not be considered a breach of the foregoing provision." (Finding 22, C 15-16).

Ford, as President, had testified extensively concerning the pardon before a Sub-Committee of the House Committee on the Judiciary under Representative Hungate. In this case he testified that he had already disclosed publicly while in office all of the facts about the pardon. In addition, after leaving office and while preparing his manuscript, he responded to press and audience questions about the pardon during interviews and

speeches. (Findings 22-23, C 15-16; Ford Dep., JA 491-96, 529-32). There was no evidence that Mr. Ford withheld comment about the facts of his public life after leaving the Presidency.

Ford's publishers also understood that the memoirs' unique information not previously disclosed would relate to Ford's personal thoughts and feelings about the events of his Presidency, rather than the events themselves. (Finding 24, C 17).

The License to Time Magazine

On March 14, 1979 when work on the memoirs was nearing completion, the plaintiffs licensed to *Time* the exclusive right to publish (before book publication) excerpts from Chapters I and III, which *Time*'s editor described as the "most interesting and moving parts of the entire manuscript." The excerpts were to appear in *Time*'s April 23 issue to go on sale at newsstands on April 16, 1979. *Time* paid $12,500 upon signing the license and was to pay another $12,500 upon its publication of the excerpts. *Time* was allowed to renegotiate the second installment in the event there was any publication from Chapters I and III before *Time*'s. (Findings 27-29, C 18-19; Cave Dep., R. Vol. V, E 1048-49).

The Nation Article

In December 1977, a new group of investors acquired the *Nation* magazine with avowed goals of increasing circulation and advertising revenue and turning the magazine around financially. Their plan included efforts "to stay on top of the news on a week-to-week basis" and the appointment of Victor Navasky as Editor. Navasky was a Yale Law School graduate with broad experience in journalism and public affairs. (Navasky Dep., R. Vol. IV, E 836-39, 841, 843-45, 849, 851).

In late March 1979, a person, never identified, secretly gave Navasky a copy of the unpublished manuscript of the memoirs. Navasky knew that his receipt of the manuscript was unauthor-

ized. Over the next 24 hours or weekend, the *Nation* rushed into print for its April 7, 1979 edition, a 2,250 word cover-featured piece "The Ford Memoirs-Behind the Nixon Pardon", derived almost exclusively from the memoirs, 83% (1,870 words) of which was copied or closely paraphrased from the unpublished manuscript. (Findings 33-36, C 20-22; E 1-41).

The extent of the copying has never been disputed. The nature of it can be readily seen by examining Plaintiffs' Exhibit 11, reproduced as Appendix E to the Petition for Certiorari, containing a side-by-side comparison of the *Nation* article and the Ford manuscript. As can be seen from a review of this exhibit, the copying included Ford's personal expression of the events and personalities of his Presidency, and of his feelings about those events and personalities. (E 1-41).

For example, defendants quoted verbatim Ford's reflections on his reasons for pardoning Richard Nixon:

> Years before, at Yale Law School, I'd learned that public policy often took precedence over a rule of law. Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible. (E 26-27).

The *Nation* also directly copied Ford's account of his reactions to seeing Mr. Nixon in the hospital, and his views on Mr. Nixon's character:

> He was stretched out flat on his back. There were tubes in his nose and mouth, and wires led from his arms, chest and legs to machines with orange lights that blinked on and off. His face was ashen and I thought I had never seen anyone closer to death.
>
> * * *
>
> A terribly proud man, he detested weakness in other people. I'd often heard him speak disparagingly of those whom he felt to be soft and expedient. (Curiously he didn't feel that the press was weak. Report-

> ers, he sensed, were his adversaries. He knew they didn't like him, and he responded with reciprocal disdain.)
>
> His pride and personal contempt for weakness had overcome his ability to tell the difference between right and wrong. (E 28-29, 38-39).

Defendants' trial testimony further demonstrated that defendants sought to, and did, copy Ford's expression. Mr. Navasky testified that he quoted Ford's portrait of Nixon because "this was his (Ford's) own way of saying it." (Navasky, TR, JA 305). He quoted Ford's vivid description of Nixon in the Long Beach hospital, because it was a "dramatic statement" and "a very powerful passage.") *Id.* at JA 334, 337). He quoted Ford's evaluation of the reasons for granting the pardon "because of the absolute certainty with which he expressed himself." (*Id.* at JA 303). He quoted Ford's account of the negotiations with Ron Ziegler because ". . . when Ford writes about this as a narrator, it was the definitive quality of that statement that made me put it in." (*Id.* at JA 306). And he quoted Ford's account of Nixon's assurances of innocence because it was "a much more powerful statement for the reader." (*Id.* at JA 300).

The *Nation*'s piece was placed on sale by April 3, 1979 despite defendants' knowledge of plaintiffs' contract with *Time* for publication in *Time*'s issue to be on sale April 16th, and despite the *Nation*'s awareness of the scheduled availability of the full book in bookstores from May 1, 1979. The *Nation* also knew that the published memoirs' commercial success would depend on public reaction to the *Time* excerpts, and were aware that the same portions which defendants copied would be of interest to *Time*. (*Nation* Article, E 6; Navasky, TR, JA 415-16; Findings 34, 67, C 21, 28-29).

At the time of publication, the *Nation* proclaimed its purpose of "scoop(ing) former President Ford on his own memoirs." (PTX 22, R. Vol. IV, E 782). They intended to make a "news event" for the wire services by recounting Ford's story of the pardon as he told it, without independent commentary. (Navasky, TR, JA 300b-300d, 316b-316f, 412-17).

Navasky's notes show that he had initially intended to include a section in his article which would critically explore the issues which he perceived the memoirs raised. (PTX 19, R. Vol. IV, E 770). However, he eschewed this approach, because "It looks like I didn't have time to . . . The story I wrote, which I did very quickly because we wanted to get it out as soon as possible, seemed to work without my going into this other stuff." (Navasky Dep., R. Vol. IV, E 893).

Due to their rush, the *Nation* also failed to check the record or realize that the pardon-related events recounted were well known, and that Ford's story was not based on government documents or information which Ford had sequestered from public view. (Findings 44-46, C 24-27; Navasky, TR, JA 341-48; Armbrister, TR, R. Vol. 1, A 123-24).

Time's Reaction

The appearance of the *Nation*'s piece caused *Time* to cancel its plans to publish excerpts and to refuse payment to plaintiffs of the $12,500 that would otherwise have been due upon *Time*'s publication. (Finding 38, C 22-23).

SUMMARY OF ARGUMENT

The majority opinion by Judge Kaufman raises important issues concerning the relationship between copyright and the First Amendment.

In reversing the District Court, the majority decided two issues: first, that most of the material admittedly copied by the *Nation* was entitled to no protection under the copyright laws, and second, that the unauthorized use of the balance of the material (*i.e.*, the material entitled to protection) was privileged under the doctrine of fair use.

The majority reached these decisions in each instance by concluding that First Amendment interests prevailed over

Copyright interests. In each instance, however, the majority failed to strike the proper balance between these constitutionally protected interests.

I. In concluding that most of the copied material was not entitled to protection under the copyright laws, the majority applied three novel theories of copyrightability. Each conflicts with traditional copyright holdings.

First, the majority held that in works dealing with news or history, "expression" is limited to its barest elements—the ordering and choice of the words themselves. In so holding, the majority excluded from consideration important elements of authorship that courts have traditionally protected: the author's selection and arrangement, his analysis or interpretation of events, the way he structures his material and marshals his facts, and the emphasis he gives to particular developments.

Second, the majority held that facts coupled with expression cannot constitute a copyrightable totality. The majority thereby departed from traditional copyright holdings which (a) have accorded copyright protection to works consisting primarily of factual material, and (b) have rejected a dissection approach in determining copyrightability and required instead that the material be looked at as a whole.

Third, the majority held that in works of nonfiction, paraphrasing constitutes copying only if it is so extensive that the copier has borrowed virtually an entire work. In so holding, the majority disregarded numerous copyright precedents holding just the opposite.

The majority's belief that these restrictions on copyrightability are necessary to advance First Amendment freedoms is without merit. The author would not become the owner of an event by describing it in words. He would only become the owner of his description of the event. That is the very material that the *Nation* copied. The District Court expressly found that the *Nation* was not interested in the facts and memoranda in isolation, but rather that it was the totality of the facts and memoranda collected together with Ford's reflections that made them of value to the *Nation*.

The majority's overly narrow definition of copyrightability will necessarily deprive authors of the protection accorded to them by the copyright laws. It will also deprive the courts of the flexibility of resolving questions of unauthorized use of copyrighted materials under the equitable principles embodied in the fair use doctrine.

II. Similarly, in its fair use analysis the majority failed to strike the proper balance between Copyright interests and First Amendment interests.

On the copyright side, the majority gave no recognition to the policy underlying the monopoly given to the author:

> . . . [T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony Corp. v. Universal City Studios, Inc., 104 S.Ct. 774, 782 (1984).

On the free speech side of the balancing, the majority relied upon the policy of facilitating the dissemination of information but failed to recognize that it had no application here, where the material was about to be published by the author, as excerpts in *Time* magazine in about two weeks and in book form two weeks after that.

The majority also disregarded two important copyright principles which, had they been applied in this case, would have led to an affirmance of the District Court's judgment.

First, the majority disregarded the fact that the material copied by the *Nation* came from an unpublished manuscript whose possession was known to be unauthorized. By publishing such material, the *Nation* took upon itself the right of first publication, a right which Congress has given exclusively to the author.

In giving no weight to the fact that the manuscript was unpublished, the majority disregarded the clear statement of congressional intent that only in extraordinary cases should an author's right of first publication be violated by another's use of material from the unpublished manuscript. No showing was made here, or even attempted, of extraordinary circumstances. No showing was made of any benefit derived by the public from the dissemination of this material by the *Nation* in advance of its dissemination by the author.

Second, the majority disregarded the fact that the *Nation* added nothing to the material it published. The *Nation*'s nonproductive use of the material should have been weighed in the fair use analysis, especially since the *Nation* conceded that it considered and rejected a productive use which would have involved virtually no copying of expression from the manuscript.

Thus the majority's conclusion that the *Nation*'s piece was fair use news reporting was based upon its failure to consider the relevant factors: the extensive use of expression; the use of material from an unpublished manuscript whose possession was known to be unauthorized, with no showing of extraordinary circumstances to justify defeating the author's right of first publication; and the non-productive nature of the use.

Given these undisputed facts, plus the District Court's finding that the *Nation*'s use diminished the value of the copyright, the determination by the District Court that there was no fair use should have been affirmed.

ARGUMENT

I

The Majority Erred in Redefining and Severely Limiting the Scope of What Is Protectible Under the Copyright Laws in a Work of Non-Fiction

In three holdings of far-reaching consequence, the majority set down new definitions of what is protectible under the copyright laws in a work of non-fiction. Thus the majority held (a)

that in works concerning news and history, the "troublesome" concept of expression must be limited to "its barest elements—the ordering and choice of the words themselves" (A 19), (b) that facts coupled with expression cannot constitute a copyrightable totality (A 21), and (c) that almost unlimited paraphrasing from a work of non-fiction is permissible, unless the copier has "borrowed virtually an entire work." (A 17).

A. The Majority's Limitations on Copyrightability Conflict with Traditional Copyright Holdings

(1) Limiting Expression to Its Barest Elements

By holding that in the context of news or history, "expression" must be limited to "its barest elements—the ordering and choice of the words themselves" the majority excluded from its consideration important elements of authorship—an author's selection and arrangement of material, his analysis or interpretation of events, the way he structures his material and marshals his facts and the emphasis he gives to particular developments. The majority holding conflicts with traditional copyright holdings.

A leading case is *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), upholding a finding of copyright infringement for publishing abstracts of plaintiffs financial research reports. The defendant in *Wainwright*, like this defendant, relied upon news reporting as its principal defense. The unanimous court there stated:

> It is, of course, axiomatic that "news events" may not be copyrighted. But in considering the copyright protection due a report of news events or factual developments, it is important to differentiate between the substance of the information contained in the report, *i.e.*, the event itself, and "the particular form or collocation of words in which the writer has communicated it." *What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he*

> *gives to particular developments*. Thus, the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the "particular expression through similarities of treatment, details, scenes, events, and characterization." In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source.

Id. at 95-96 (citations omitted; emphasis supplied).

This definition of expression has been consistently followed in other circuits. As early as 1921, the Seventh Circuit held the "arrangement and manner of statement" of news and facts to be protected. *Chicago Record-Herald Co. v. Tribune Ass'n.*, 275 F. 797, 799 (7th Cir. 1921). The court there stated: ". . . if the whole of it were considered as stating news or facts, yet the arrangement and manner of statement plainly discloses a distinct literary flavor and individuality of expression peculiar to authorship, bringing the article clearly within the purview and protection of the Copyright Law." The Seventh Circuit followed this holding in *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957), there defining copyrighted expression in a historical work to include "[t]he association, arrangement and combination of ideas and thought and their form of expression. . ." *Id.* at 603.

In *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), involving alleged copying from a work of non-fiction concerning a highly publicized kidnapping, the Fifth Circuit upheld instructions to the jury that "the form of expression of the facts and their arrangement and selection are copyrightable"; and that while a general theme cannot be copyrighted, "its expression throughout the pattern of the work, the sequence of its events, the development of the interplay of its characters and its choice of detail and dialogue can be copyrighted." *Id.* at 1368. In *United States v. Hamilton*, 583 F.2d 448, 450 (9th Cir. 1978), the Ninth Circuit accorded protection to a mapmaker's "selection, arrangement, and presentation of terrain features."

Other holdings of the Second Circuit are also consistent with *Wainwright*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). In *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929), the court protected the "association, presentation and combination of the ideas and thought" which went to make up plaintiff's lectures on memory improvement; and in *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962), the court protected plaintiff's "analysis, organization of material, phrasing and citations" in a book on real estate condemnation proceedings.

District courts have also followed a broader definition of "expression" than that applied by the majority. Thus in *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 923 (S.D. Cal. 1963), the court applied the "association, arrangement and combination of ideas and thoughts" definition to determine what was copyrightable in the plaintiff's biography of a historical figure. And in *Amana Refrigeration, Inc. v. Consumers Union of the United States, Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1977), the court rejected an argument that a Consumer's Union report on a particular product was not copyrightable because it was merely a "bald statement of fact without originality," finding instead that the paragraph which had been copied from the report was "more than mere statement of fact. It contains defendant's original analysis and conclusion and is copyrightable."[2]

A narrow definition of expression is particularly inappropriate in the case of autobiography. Autobiography is more expressive than other works of history because, by its nature, autobiography gives the author's unique perspective of the events depicted. Lower courts have cited the importance of this distinction in copyright cases. *See Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) and *Marvin Worth Productions v. Superior Films Corp.*, 319 F. Supp. 1269, 1275-76 (S.D.N.Y. 1970). In both cases the court distinguished

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[2] Nimmer also rejects a narrow definition of expression. 1 M. Nimmer, *Nimmer on Copyright*, § 2.11[D], "Protection for the Selection and Arrangement of Facts" at 2-164-65 (1984).

between the use of prior copyrighted statements concerning the subject of the biography and use of the independent intellectual creation of that person.

The expressive nature of autobiography is directly relevant to this case, because it was Ford's unique perspective which the *Nation* copied. In a finding that is not challenged, the District Court stated that:

> . . . [the] facts and memoranda were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. (B 10).

Thus the *Nation* is incorrect in its contention that the majority's narrow definition of expression merely represents an application of long-established law. (Br. in Opp. 5-7). Judge Kaufman's prior opinion in *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980), in no way supports this contention; *Hoehling* simply held that protection was limited to expression; it did not seek to define expression. Even if *Hoehling* did support the majority's narrow definition, that would not negate the conflict between that definition of expression and the traditional definition set forth above.

(2) Denying Copyrightability to Facts Coupled with Expression

The ruling that fact coupled with expression cannot constitute a copyrightable totality (A 21) conflicts with traditional copyright holdings on two counts.

First, the unauthorized copying of works consisting primarily of factual material has been held to be an infringement by a number of circuits. Thus, copyright protection has been accorded to "the arrangement, expression and manner of presentation" of mathematical data and formulae concerning hydraulic cylinders, *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); to the selection, ordering and arrangement of the names and addresses of suppliers of gardening materials, *Schroeder v. William Mor-*

row & Co., 566 F.2d 3 (7th Cir. 1977); to a telephone directory, *Leon v. Pacific Telephone and Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); and to the selection and arrangement of cases under particular sections of the Ohio code, *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928).

Recently, a different panel of the Second Circuit found that plaintiff's compilation of baseball cards had been infringed by defendant's compilation. The court expressly rejected the defendant's contention that "selection and arrangement of information does not merit protection." *Eckes v. Card Prices Update*, No. 83-7920, slip op. at 4274 (2d Cir. June 8, 1984).[3]

In the above cases, the courts have accorded copyright protection because of the authorship involved in creating the compilation. Surely, the authorship in a presidential memoir, or any other work of history, is entitled to as much protection as the authorship in a compilation of baseball cards.

The majority's rejection of the totality concept is also in direct conflict with cases in the Ninth and Fifth Circuits. In *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970), the Ninth Circuit held that although the textual material in a greeting card was in the public domain, this did not end the inquiry into the copyrightability of the entire card. Rather the court held the "proper analysis" of the issue required that "all elements of each card, including text, arrangement of text, art

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[3] An alternative approach to determining copyrightability in factual works is proposed in Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 Colum. L. Rev. 516 (1981). The suggested approach is to "find authorship in the act of aggregating isolated pieces of information. The particular *collection* of data would thus itself be a work of authorship." (*Id.* at 530; emphasis in original). The author argues that this rule should apply to nonfiction narratives as well as other factual compilations. (*Id.* at 538) and that such a rule "would compel a defendant who has made a substantial appropriation of facts to rely directly upon the fair use defense, thus providing an opportunity for a detailed analysis of the nature and effect of the defendant's appropriation." (*Ibid.*) The Denicola approach would provide an independent ground to support a finding of copyrightability in this case. However, because the material copied in this case was copyrightable under the traditional standards applied by the District Court, it is not necessary to determine the validity of this alternative approach.

work and association between art work and text, be considered as a whole." *Id.* at 1109.

In *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978), the Ninth Circuit adhered to the doctrine of *Roth*. There the court rejected the defendant's argument that the map which it had copied was not entitled to copyright because it was merely a synthesis of information already depicted on maps in the public domain, finding instead that "[w]hen a work displays a significant element of compilation, that element is protectible even though the individual components of the work may not be, for originality may be found in taking the commonplace and making it into a new combination or arrangement." *Id.* at 451.

And in *Sid & Marty Krofft Television Productions, Inc. v. MacDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), the Ninth Circuit also rejected the defendant's "invitation to dissect the works," holding that ". . . it is the *combination* of many different elements which may command copyright protection because of its particular subjective quality." *Id.* at 1169.

Recently, the Fifth Circuit criticized a trial court for dissecting plantiff's work and dividing it into components in determining copyrightability. *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984). The court stated, "The mere fact that component parts of a collector's work are neither original to the plaintiff nor copyrightable by the plaintiff does not preclude a determination that the combination of such component parts as a separate entity is both original and copyrightable." *Id.* at 388.

A prior decision of the Second Circuit has also endorsed the "totality" concept which the majority below rejected. In *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922), the court found that the defendant had infringed the plaintiff's copyright to its compilation of trademarks, stating "if a man compiles a book containing such information [name, occupation, place of business, residency] about the residents of a particular place, *he may . . . copyright it as a whole*, notwithstanding the fact that the separate parts of which it is composed are not copyrightable." *Id.* at 87 (emphasis supplied).

The artificiality of the *Nation's* dissection approach to copyrightability is graphically illustrated by the *Nation's* own analysis of copyrightability (Addendum A to the *Nation's* post-trial memorandum, included by the *Nation* in the Joint Appendix at JA 557). Addendum A is aptly titled a "sentence-by-sentence analysis" of the *Nation* article. It proceeds from the premise that if some reason can be found for denying copyrightability to a particular sentence, that sentence is excluded from any future copyright consideration. Obviously such an approach makes it impossible to consider whether the sentence in question, in combination with other sentences, is entitled to protection because of the selection, arrangement or emphasis of the material as a whole.

The District Court correctly rejected this artificial approach. Thus, for example, under the District Court approach, even though plaintiffs were not claiming copyright in the Ruth memorandum, that would not preclude President Ford from obtaining protection for his description of various factors influencing his decision to grant the pardon, including the advice received from Ruth. (E 16-17). The District Court, evaluating all the evidence, correctly found that the "historical facts, memoranda, and statements [were] integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." (B 11). This finding is not challenged.

(3) Allowing Virtually Unlimited Paraphrasing From a Work of Non-Fiction

Finally, the holding that paraphrasing from a work of nonfiction constitutes infringement only if the copier "borrowed virtually an entire work" (A 17) is in conflict with traditional copyright holdings in several circuits. In *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966), the Seventh Circuit found infringement where defendant had paraphrased two pages of a 32-page booklet containing mathematical data and formulae. In *Wagner*

v. Meccano Ltd., 246 F.603 (6th Cir. 1917), *aff'g* 234 F. 912 (S.D. Ohio 1916), the Sixth Circuit upheld a finding of infringement based upon paraphrasing of some of the statements and descriptions in an instruction manual for mechanical toys. In *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 87 (6th Cir. 1928), the Sixth Circuit found infringement after reviewing 54 instances of "paraphrasing or identities of expression" taken from the plaintiff's 11 volume work.[4]

District courts have also held that paraphrasing of less than an entire non-fiction work or an entire chapter of a non-fiction work constitutes infringement. For example, in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), the court held that the defendant's paraphrasing of three sentences from the plaintiff's scientific book on the human voice constituted infringement because ". . . it is not necessary that the whole or even a large portion of the book shall have been copied. It is sufficient if a material and substantial part shall have been copied, even though it be but a small part of the whole." *Id.* at 303.

B. The Majority's Limitations on Copyrightability Are Not Needed to Advance First Amendment Freedoms and Would Undermine Important Copyright Policies

Underlying the majority's three holdings limiting copyrightability was its perceived need to "construe the concept of copyrightability in accord with First Amendment freedoms." (A 19). The majority feared that unless it limited the scope of copyright protection in the manner outlined above, an "individual could

[4] In attempting to distinguish these cases, the *Nation* simply mis states their findings. The courts in *Flick-Reedy* and *Wagner*, did not find that the defendants had copied the entirety of the plaintiffs' works, as the *Nation* asserts (Br. in Opp. 8). They found exactly the opposite, that the entire work had not been copied. *Flick-Reedy*, 351 F.2d at 549 and *Wagner*, 234 F. at 922. Nor did the court in *W. H. Anderson Co.* rest its decison solely on a finding that the defendant had used the plaintiff's entire work (Br. in Opp. 8-9) but rather concluded that the defendant's outright copying and paraphrasing in the 54 instances specifically alleged by the plaintiff was sufficient to conclude the question of substantial infringement in the plaintiff's favor. 27 F.2d at 88.

be the owner of an important political event merely by being the first to depict that event in words" (A 19) and a public official could "take private possession of the most important details of a nation's historical and political life by adding language here and there on the perceptions or sentiments he experienced while in office and insisting that the work's entire contents are thereby made his alone by virtue of copyright." (A 21).

Such fears are wholly unfounded. The individual would not become the "owner" of the event by being the first to depict it in words. He would become only the owner of his own description of the event. And even that ownership is subject to the limitation of the doctrine of fair use. Therefore, in determining whether a particular use is fair, a court applying this doctrine will consider all competing policy interests, including First Amendment interests.

The majority's rationale for limiting the scope of copyright protection also has no application to the facts of this case. Petitioners were not seeking protection for facts and memoranda in isolation, and in findings that are unchallenged, the District Court expressly found that these facts and memoranda:

> . . . were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation. (B 10-11).

The majority's artificial definition of expression will deny an author protection for important elements of authorship. As the dissent observed, traditional copyright cases provide protection for ". . . the author's original articulation and presentation of the facts. Copyright laws protect originality. They are meant to safeguard the embodiment in a tangible medium of an author's intellectual labors. . . . They thus offer protection against a work that is substantially an unoriginal appropriation of the

copyrighted work." (A 41-42). The majority approach, by depriving an author of this protection, necessarily undermines an important purpose of the copyright laws.

Equally important, the majority approach limits a court's flexibility in dealing with unauthorized uses of copyrighted material. The greatly increased use of copyrighted material permitted by the majority's holdings will not be subject to any of the factors traditionally considered by a court applying the fair use doctrine. The majority has, in effect, transformed a fair use question into an issue of copyrightability. There is a vast difference between sanctioning a use of material because the use is fair, and sanctioning such a use because the material is entitled to *no* protection at all. Under the fair use approach, a court will consider all factors relevant to the "equitable rule of reason" which the fair use doctrine embodies. The majority's approach, in contrast, precludes any weighing of these equitable considerations. A court following the majority approach must therefore sanction the use even if society derives no benefit from it, and indeed even if the use is harmful to important policies underlying the Copyright Act. As we shall demonstrate in Point II, that is precisely what happened in this case.

C. The District Court's Findings that the Material Was Copyrightable Should Be Affirmed

In view of the foregoing, the standards applied by the District Court in determining copyrightability were correct. Since no challenge is made to the factual determination in applying these standards, the factual determination should be upheld.

The District Court was also correct in concluding that it was not necessary to decide whether statements attributed to others are copyrightable. The court stated:

> This principle [that the copyright laws protect the totality of the facts and memoranda collected together with Ford's reflections] governs the portions of Ford's memoirs reciting the statements of individuals other

> than Ford as well. I decline to enter the thicket of deciding which statements were exact quotations—and therefore not protected by copyright—and which were merely reconstructions of statements pieced together by Ford—and therefore copyrightable. I suspect that most were to some degree reconstructions. Suffice it to say that, simply viewed, I regard the historical facts, memoranda, and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence. (Citations omitted) (B 11).[5]

For similar reasons, it is unnecessary to decide whether President Ford's Hungate testimony on the Nixon pardon is in the public domain. The version told in the manuscript is clearly a different version, incorporating, among other things, material concerning the advice given to Ford by his aides between his first and second conversations with Haig.[6] The new version is

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[5] Nimmer agrees with the District Court that reconstructions of statements attributed to others are copyrightable and that the statements attributed to others in this case must have been reconstructions; he criticizes the contrary conclusions reached by the majority. Referring to the *Harper & Row* case, Nimmer states: ". . . there was a factual dispute between the parties as to whether quotations of others contained in President Ford's memoirs were literal (and hence unprotectible by Ford and his assigns), or reconstructed by Ford, and, therefore, protected "expression" under his copyright. The Court of Appeals apparently assumed that the quotations were literal, although in most instances it would seem that recollections of statements made by others in the past must of necessity involve reconstruction rather than literal repetition." 1 M. Nimmer, *Nimmer on Copyright*, § 2.11[B] at 2–161, n.11 (1984).

[6] Other material incorporated in the manuscript version, and not in the Hungate testimony, includes: the characterization that the new tapes contained the "smoking gun"; the deep hurt which Ford felt on learning the new disclosures; Nixon's repeated assurances of innocence, which Ford had believed; Ford's initial response to Haig that it would be improper for Ford to make any recommendations; and the fact that Ford's statement to Haig was written out. (The relevant portions of the Ford manuscript and the *Nation* article are set forth at E 6 through E 15. The relevant portions of Ford's Hungate testimony are contained in PTX 15, R. Vol. IV, E 699-702).

therefore entitled to protection.[7] Having urged throughout the trial that the new version had a different emphasis (Navasky, TR, JA 348-50, 375-83, 452-53), and having stressed that the "main thing" in the new version was "the configuration of information, rather than this or that" (Navasky Dep., R. Vol. IV, E 924-25), the *Nation* is in no position to argue that such version lacks originality.[8]

II

The Majority Erred in its Fair Use Analysis

A. The Majority Did Not Strike the Proper Balance Between the Constitutionally Based Policy of Encouraging Authorship and the First Amendment

The majority saw this case as requiring it to find the proper balance between "the author's monopoly of his original writings" on the one hand and "the citizenry's need to be informed" on the other. (A 24).

Both policies are important and, indeed, constitutionally based. Finding the right accommodation is an important function of the fair use doctrine. The majority, however, did not strike the proper balance.

On the copyright side, the majority referred frequently to the "monopoly" of the author, but nowhere acknowledged that underlying the monopoly is an important public policy. As this

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[7] *Best Medium Publishing Co., Inc. v. The National Insider, Inc.*, 385 F.2d 384 (7th Cir. 1967), *cert. denied*, 390 U.S. 955, *rehearing denied*, 390 U.S. 1008 (1968). *See also* § 101 of the Copyright Act which defines a derivative work to include a work "consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship." 17 U.S.C. § 101 (1982).

[8] The majority stated that "[a]dditional reasons preclude a finding that much of this material is copyrightable," citing Ford's Hungate testimony, and the statements attributed to others. (A 22-23). For the reasons set forth in the text, it is not necessary to reach these issues.

Court recently observed in *Sony Corp. v. Universal City Studios, Inc.*, 104 S.Ct. 774, 782 (1984):

> . . . the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Moreover, the majority downplayed authorship, as we have demonstrated in Point I, by defining what is protectible in such a way as to eliminate important elements of authorship. The majority thereby gave no consideration to the elements of authorship considered by the dissent: "method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original." (A 42).

Finally, by reason of its arbitrary definition of authorship, the majority saw the case as involving only a "very limited use of copyrighted words" (A 29) and the taking of a "meager, indeed an infinitesimal amount of Ford's original language." (A 30). Had the majority applied the correct standard, it would have faced a case involving extensive taking of expression.

On the free speech side of the balancing, the majority's analysis was equally defective. In the majority's view, application of the copyright laws to this use would "impede that harvest of knowledge so necessary to a democratic state." (A 4).

As publishers, we would be the first to recognize the importance of that policy, but it has nothing to do with this case. For there was nothing that the *Nation* did here that facilitated the harvesting of knowledge. The material was about to be published, as excerpts in *Time* magazine in about two weeks, and in full in book form about two weeks after that. The knowledge was going to be harvested in any event, by reason of authorized publications planned by the author and his publishers.

The majority nowhere acknowledges this. Nor does the majority make any attempt to demonstrate that society derived some benefit from publication in the *Nation* two weeks in ad-

vance of publication in *Time*, or four weeks in advance of publication in book form.

Rather than facilitating the harvest of knowledge, the *Nation* simply took upon itself the right to be the first publisher of President Ford's expression, a right expressly conferred on President Ford by the copyright laws and licensed for value to the plaintiffs. 17 U.S.C. § 106(3). The editor of the *Nation* aptly characterized his own article when he said that he had "scoop(ed) former President Ford on his own memoirs." (PTX 22, R. Vol. IV, E 782). It is that which the majority has sanctioned, not the harvest of knowledge.

The precedent set by this case will adversely affect both the incentives to authorship and the dissemination of information.

Under the majority holding it is clear that one may, with impunity, "steal" a manuscript and publish its contents, at least if one takes care to paraphrase less than the entire work. If the manuscript is returned, no offense has been committed. In the majority's view "[m]erely removing" the manuscript under those circumstances constitutes "far too insubstantial an interference with property rights to demonstrate conversion." (A 12-13). Nor is there any liability for trespass to chattels, for that requires "a showing of actual damage to the property interfered with." (A 13, n.5).

The sanctioning of such conduct will not only require a publisher to turn his publishing house into an armed camp. It will also impair his ability to license the publication of excerpts in advance of book publication. Aware of the import of the holding, publishers will know that if they circulate a manuscript to ascertain third party interest in acquiring such rights, there is a real risk that someone will take for free that which is being offered for sale.

This impediment to the exploitation of rights will lessen the incentive for authorship and adversely affect the dissemination of knowledge. Publication of excerpts in advance of book publication serves an important public purpose of disseminating knowledge of the contents of the book to the readers of the

magazine, frequently an audience far larger than the readers of the book. To the extent that publishers are deterred by the majority holding from licensing pre-publication excerpts, that important public purpose will not be served.[9]

Indeed, this case illustrates such an adverse impact. Since *Time* cancelled its publication, the net result of the *Nation's* publication was that excerpts from the manuscript were disseminated to the public not in *Time* magazine, but in the *Nation*, a magazine that obviously reaches a far smaller audience. It is ironic that this result was approved in the name of harvesting knowledge.

The dissenting judge, whose view of the case was not distorted by the errors discussed above, concluded that the only freedom the majority has advanced here was the freedom to "chisel[] for personal profit." (A 48). The sanctioning of such conduct will surely have an adverse impact on authors and publishers.

B. The Majority, Disregarding Congressional Intent, Gave No Weight to the Fact That the Manuscript Was Unpublished

The majority erred in rejecting the fact that the manuscript was unpublished as a factor to be considered in determining fair use.

The District Court had correctly concluded that "[t]he fair use defense is narrowed when the work is unpublished." (C 32).

This holding was consistent with the legislative history of the 1976 Copyright Act, 17 U.S.C. § 101 *et seq*. In that Act, Congress recognized for the first time a separate statutory right of

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[9] *The New York Times* on March 16, 1984 reported that "[t]o insure against leaks" Random House had decided not to offer Governor Cuomo's new book to book clubs or magazines. Governor Cuomo's agent described the book as "one of the most thoughtful pieces of writing ever committed by a political figure" and the author as a "highly articulate, deeply introspective man writing about public life in a way that's enormously revealing without being invidious." *The New York Times*, at C22, col. 2.

first publication. (17 U.S.C. § 106(3), H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976)).[10] In the legislative history Congress made clear its intent that the distinction between published and unpublished works was a factor to be weighed in the fair use analysis. The Senate report states:

> The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances, the copyright owner's right of first publication would outweigh any needs of reproduction for classroom purposes.

S. Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975).

The holding by the District Court limiting the applicability of the fair use defense in the case of an unpublished manuscript is also consistent with copyright precedents prior to the adoption of the 1976 Copyright Act. Before the 1976 Copyright Act became effective, unpublished works were protected by common law copyright. At common law, the author clearly had "the exclusive right to the first publication" of his work. *Atlas Mfg. Co. v. Street & Smith*, 204 F.398, 402 (8th Cir.), *appeal dismissed*, 231 U.S. 348 (1913). It was acknowledged that, in the case of an unpublished work, "any use that others made of it might be unfair." *Fendler v. Morosco*, 253 N.Y. 281, 291, 171 N.E. 56, *reh'g denied*, 254 N.Y. 563, 173 N.E. 867 (1930). *See generally* A. Latman, *Fair Use of Copyrighted Works*, Study No. 14 in *Copyright Law Revision, Studies Prepared for the Senate Committee on the Judiciary*, 86th Cong., 2d Sess. (1960), (*reprinted* in 2 Arthur Fisher Mem. ed. 781, 785 (1963); 2 M. Nimmer, *Nimmer on Copyright*, § 8.23 at 8-273 (1984).

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[10] The Report of the House Committee on the Judiciary states that "Clause (3) of section 106 establishes the exclusive right of publication. . . . Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 62 (1976).

The *Nation* cites Nimmer to support the majority's rejection of this factor (Br. in Opp. 12-13). The most recent update of Nimmer's treatise, however, undercuts the majority's position. Nimmer states, ". . . the scope of the fair use doctrine is considerably narrower with respect to unpublished works which are held confidential by their copyright owners." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-73 (1984).

Both logic and policy support the distinction between a published and unpublished manuscript in fair use cases.

First, an author who has published a work may be deemed to have consented to its "fair use" by others. Obviously, no such consent may be said to apply to unpublished material. Indeed, until the manuscript is published, one cannot say with certainty that the words in the manuscript are the words that the author chooses to publish. In this case, for example, the *Nation* copied an unpublished typescript which was still subject to revision. Extensive changes were made in the galleys before the book was published. (Findings 19, 33, C 11-12, 20-21). The *Nation* had no way to know that there would be no significant changes in the material which it copied. The *Nation* therefore published President Ford's words without giving him an opportunity to complete them himself.

A second and more important reason is that a person who uses expression from an unpublished manuscript is taking it upon himself to be the first publisher of the author's expression. That, however, is one of the author's exclusive rights under the Copyright Act. (17 U.S.C. § 106(3); n. 10, *supra*, p. 30).

The legislative history cited above makes clear the intent of Congress that an author's right of first publication should be defeated only in extraordinary circumstances. A user of material from an unpublished manuscript who invokes the fair use defense should therefore demonstrate that the public will derive some benefit from his dissemination of the material in advance of its dissemination by the author which outweighs the author's right of first publication. The mere fact that the material may be of interest to his readers does not provide such a justification, at

least if the manuscript is soon to be published. In such a case the benefit shown should relate to the availability of the material in the time period prior to authorized publication (in this case 2-4 weeks).

No showing was made in this case that the publication of the material ahead of its publication by the author conferred any benefit on the public. Indeed with respect to the vast majority of the article—everything that was copied except the material relating to the Ford-Haig discussions before Ford became President—the *Nation* made no claim that its early dissemination benefited the public. The magnitude of this material can be seen by examining the article itself. Of the 38 paragraphs in the article, 32 copied expression from the manuscript. Of these at most 7 relate to the Ford-Haig discussions before Ford became President. (E 6 through E 14, first full paragraph). The remaining 25 relate to other matters: the factors considered by President Ford in granting the pardon, and the steps taken and difficulties encountered in carrying out the decision; President Ford's decision to visit former President Nixon in the hospital and his vivid description of that visit; President Ford's personal assessment of Nixon's character, and his account of his reactions on hearing Nixon's resignation speech; President Ford's decision to seek reelection; the impact that a White House photographer had on President Ford's decisions involving the *Mayaguez;* as well as other matters. (E 4; E 14, second full paragraph, through E 40). Thus the *Nation* never claimed that the public derived any benefit from the dissemination, ahead of the author, of 25 paragraphs in its article which copied expression from the manuscript.

Nor was any adequate showing made for the dissemination, ahead of authorized publication, of the seven paragraphs covering the Haig-Ford discussions prior to Ford becoming President. Mr. Navasky testified that he wanted to isolate these discussions and remove the "veneer of innocence" they had in the book, so that editorial writers and the public would read the manuscript through the screen of the questions he was implicitly raising. (Navasky, TR, JA 283, 305-17, 418-20).

This testimony would not constitute a showing of extraordinary circumstances, even if accepted.[11] Mr. Navasky testified that he could have written a persuasive piece after the book was published, but the circulation of that piece would have been limited to the "sub-set" of the readers of his magazine. (Navasky, TR, JA 295-96, 316f-316g, 412-13, 416-18). His reason for publishing in advance of book publication was that it was an opportunity for him to "make news", as opposed to "reporting news" and thereby get additional coverage for his article. (*Id.*). After the book was published, there would be no news value in the story. (Navasky Dep., R. Vol. IV, E 881-82).

But this testimony simply means that the *Nation* has exploited for its own sake the right of first publication. In still another finding that is unchallenged, the District Court stated:

> Mr. Navasky's expressed desire to beat out the competition (TR. 466-67) and to "make news" (TR. 467-68) and create a "news event" (TR. 536) so as to get additional coverage for his magazine through the wire services (TR. 452-53; 456) refers to benefits Mr. Navasky was seeking for the *Nation* and not to any necessity for publication of excerpts in advance of publication authorized by the copyright owner. (C 27-28).

In any event, the *Nation* did not limit its copying to 7 paragraphs. It went on to include in its article an additional 25 paragraphs copying expression from the unpublished manuscript. Since it used far more than necessary to satisfy its purported need to publish ahead of the author, the defense of fair use cannot prevail.[12]

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[11] The explanation is strained, especially when Mr. Navasky denied that without his article, columnists, newspapers and reporters would not have focused on the possibility of the impropriety. (Navasky, TR, JA 432, 549).

[12] The use of material in excess of that needed to satisfy a legitimate purpose has been cited in decisions rejecting a fair use defense. For example in parody cases, the courts have limited use to no more than necessary to recall or conjure up the original work. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). When the user takes more than is necessary for that purpose, fair use has been rejected, *Walt Disney Produc-*

The District Court correctly concluded that:

> The *Nation* article appropriated copyrightable expression far in excess of what was necessary to satisfy any conceivable legitimate news reporting purpose. (C 32).

C. The Majority, in Conflict With This Court's Decision in *Sony*, Gave No Weight to the Fact That the Use Was Non-Productive

The entire Court, in *Sony Corp. v. Universal City Studios, Inc.*, 104 S.Ct. 774 (1984) believed that whether or not a use is productive is an important factor in determining fair use. Indeed, the four dissenters believed that factor was controlling. After setting forth examples of fair use, the dissent stated:

> Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work. The fair use doctrine, in other words, permits works to be used for "socially laudable purposes." . . . I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use. (emphasis in original; citations omitted).

104 S.Ct at 807-08.

The majority in *Sony* disagreed only on whether the factor was determinative:

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tions v. The Air Pirates, 581 F.2d 751 (9th Cir. 1978). And in *Folsom v. Marsh*, 9. F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) involving unauthorized copying of copyrighted writings of President Washington, Justice Story relied upon the use of material in excess of that necessary for the purposes of criticism to reject a fair use defense. Justice Story reasoned that a reviewer may quote "if his design be really and truly to use the passages for the purpose of fair and reasonable criticism," but "if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitutes the review for it, such a use will be deemed in law a piracy." 9 F. Cas. at 344-45.

> Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative.

Id. at 795, n.40.

In its Brief in Opposition to the Petition for Certiorari, the *Nation* does not challenge that this factor is relevant to fair use analysis. Rather the *Nation* argues that its use must have been productive because it was "news reporting." (Br. in Opp. 10).

The *Nation's* contention, however, is a non sequitur. As noted from the quotation above, a productive use is one which results "in some added benefit to the public beyond that produced by the first author's work." Whether or not a particular use is claimed or assumed to be news reporting does not answer the question of whether the use results in some added benefit to the public.

The Second Circuit's decision in *Wainwright Securities Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) confirms that the lack of any added benefit to the public is a factor to consider in the fair use analysis, even where the defendant is urging news reporting as a defense. The court there stated:

> Unlike traditional news coverage, moreover, the Transcript did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysts; and it did not include any criticism, praise, or other reactions by industry officials or investors. Rather, the Transcript appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor.

Id. at 96.

The *Nation*'s argument that its use must have been productive because it was news reporting is also contradicted by the facts in the case.

The District Court found that:

> The article was derived almost exclusively from the memoirs. The only contributions by Mr. Navasky were the inclusion of some information concerning the publication schedule of the book and of the *Time* excerpts, a few transition sentences, and three concluding paragraphs in which Mr. Navasky stated that the May 5, 1979 issue of the *Nation* would deal with the "ethical problems" raised by his publication. At his deposition, Mr. Navasky aptly characterized his contribution as "invisible." (PTX 33, Navasky Dep. at 125)

(Finding 36, C 22).

These findings are not challenged. Indeed the correctness of the findings was accepted by both the dissent and the majority in the Court of Appeals. As the dissent observed, the *Nation* article was of "trivial originality and contained no independent research by the author." (A 42).

The majority openly acknowledged that it gave no weight to the fact that the use was non-productive, criticizing the dissent's requirement that "legitimate news add original commentary or contain original research." (A 26). The majority stated that such a requirement ". . . sounds distinctly like an assertion that 'fair use' turns on the amount of the user's labor. The Second Circuit has rejected that approach." (A 26-27).[13]

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[13] The Second Circuit *has* previously held that a second author may make use of a prior author's research. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Until the majority's decision below, however, this principle had not been extended to permit the second author to add nothing at all to the prior author's material, and still call it a fair use.

Unless labels are to prevail over substance, as found by the lower courts, the non-productive nature of the use should have been considered in weighing the fair use defense.[14]

In the facts of this case, moreover, the factor was entitled to added weight, because Mr. Navasky conceded that he considered, and rejected, a possible productive use which would have used only a small fraction of the expression actually used. The article which he rejected would have been an overt editorializing story in which he made the charge that there was an obstruction of justice in the conversations between Ford and Haig before Ford became President and called for an investigation. (Navasky, TR, JA 295-96, 316a-316b, 430). As noted in Point II B. at page 32, these conversations were covered in seven paragraphs in the article, at most. (E 6 through E 14, first full paragraph). In the editorializing story, the content of these paragraphs would have been contained in a footnote, and the balance of the material—comprising 25 paragraphs—would not have been included. (Navasky, TR, JA 316a-316c; E 4; E 14, second full paragraph through E 40).

A person invoking the fair use defense should use no more expression than is necessary to satisfy a legitimate need.[15] Since the editor conceded he could have written an article containing virtually no copying of expression, he should not be permitted to claim a fair use defense for an article containing extensive

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[14] Nimmer's alternative argument—that the *Nation*'s use was productive because it was an abridgment—does not withstand analysis. Nimmer states: "An abridgment may constitute a derivative work (*see* § 3.03 *supra*), and hence a productive use. On this basis, the majority in the *Nation* case was correct in rejecting Judge Meskill's dissenting view that the defendant could not invoke fair use because it had not added original commentary or original research." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A][1] at 13-68, n.23.6a. The *Nation* article may well be an abridgment, and an abridgment is one of the examples of a derivative work specified in section 101 of the Act, 17 U.S.C. § 101 (1982). However, under section 106(3) of the Copyright Act, the owner of the copyright is given the exclusive right to prepare derivative works. Therefore an unauthorized abridgment, without more, should not be considered a productive use for fair use purposes.

[15] *See* n. 12, *supra*, p. 33.

copying of expression, especially when the latter use was non-productive.

The reasons offered by Mr. Navasky for rejecting the productive use do not help his case. He offered two. "One was I wasn't sure which of what I saw in the manuscript was new evidence at that point." (Navasky, TR, JA 296). Surely a user's awareness that he has not done the necessary research to write a productive piece provides no excuse for rejecting such an approach. As Nimmer has stated in criticizing the Court of Appeals' decision in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967): "Insofar as they [the defendants] chose to avoid the expenditure of time and skill necessary to evolve their own expressions and instead copied the plaintiff's expression, there can be no First Amendment justification for such copying." M. Nimmer, *Nimmer on Freedom of Speech*, § 2.05[C] at 2-81 (1984). The principle has particular relevance here where one of the *Nation*'s own experts testified that digging into the known record and comparing the material with the known record were important jobs of a journalist. (Friendly, TR, JA 82, 119-20).

Mr. Navasky also testified that the best chance of having the material "taken as fact" was outside the context of express commentary or criticism. (Navasky, TR, JA 297). Since the book was soon to be published, this excuse carries little weight. Moreover, it would excuse at most the seven paragraphs covering the Ford-Haig discussions, and would not justify the extensive additional copying that took place here.

D. The Errors by the Majority Prejudiced Its Analysis of the News Reporting Defense

The *Nation*'s principal defense in this case is that its use was a kind of "news reporting" and that this automatically establishes a fair use defense. Of course, "news reporting," even if found to exist, is not the equivalent of a fair use defense. The statutory language of section 107 of the 1976 Copyright Act, 17 U.S.C. §§ 101 *et seq*. makes this clear. After citing "news reporting" as one of the permissible fair use purposes, the section goes on to

provide that in "determining whether the use made of a work *in any particular case* is fair" certain enumerated factors are to be considered. Moreover the legislative history indicates that even the factors enumerated are not exclusive. H.R. Rep. 94-1476, 94th Cong., 2d Sess. 65-66 (1976). As this Court stated in *Sony*, 104 S.Ct. 774, 792 (1984), the fair use doctrine is an equitable rule of reason.

The undisputed facts that the majority disregarded, as a result of the erroneous standards discussed above in this brief, compel the conclusion that the *Nation* article was not "news reporting" within the meaning of the section, and that in any event fair use would not apply.

The majority's overly narrow definition of what is copyrightable precluded it from giving adequate consideration to the extent of expression used. Lower courts have, correctly, considered this factor in evaluating a news reporting defense.

Thus in *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), the court stated:

> . . . the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of expression used by the news source.
>
> Here the appellants did not bother to distinguish between the events contained in the reports and the manner of expression used by the Wainwright analysts.[16]

[16] The *Wainwright* court, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), contrasted one-time use by the Wall Street Journal with repeated use by the Transcript. This distinction, however, does not help the *Nation*, because the court relied upon the contrast to emphasize that the Transcript's use of the Wainwright reports was ". . . blatantly self-serving, with the obvious intent, if not the effect, of fulfilling the demand for the original work." (*Id.* at 96). Here the District Court found that the *Nation's* "one-time" use was self-serving and diminished the value of the copyright. (B 8; Findings 38, 54, 57, 66, 67, C 22-23, 27-29).

And in *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980), the court also rejected a news reporting defense stating:

> . . . ABC possessed an unfettered right to use any factual information revealed in *Champion* for the purpose of enlightening its audience . . . , but it can claim no need to "bodily appropriate" Iowa's expression of that information by utilizing portions of the actual film.

See also Roy Export Co. v. Columbia Broadcasting System, Inc., 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982) (rejecting CBS' claim that the First Amendment right to report newsworthy events shielded it from liability for the unauthorized showing of a copyrighted Chaplin film).

The majority's erroneous belief that facilitating the dissemination of information was an overriding factor in this case led it to overlook the fact that what the *Nation* really did here was to "scoop former President Ford on his own memoirs." (PTX 22, R. Vol. IV, E 782). Mr. Navasky, in fact, distinguished between "reporting news" and "making news" referring to "our goal of not only reporting this event, but making news out of our report." (Navasky, TR, JA 296). Had he limited himself to "news reporting" he acknowledged he would not have needed to publish in advance of the authorized publication by the author. (Navasky, TR, JA 316f-316g, 416-17). But to make news, which was his objective, he had to publish early. (*Id.*). In so doing, he was arrogating to himself the author's right of first publication.

Finally, and most important, the majority did not consider that (1) the *Nation* used material from an unpublished manuscript, whose possession was known to be unauthorized, with no showing that its publication ahead of the author provided any benefit to the public, and (2) the *Nation* made a non-productive use, after rejecting a productive use that would have involved copying virtually no expression from the manuscript.

Each of these factors, in isolation, would provide an adequate justification for affirming the District Court. Considered together they provide a compelling case for affirmance.

In view of the foregoing, the *Nation*'s criticisms of the District Court's opinion on news reporting are irrelevant. (Br. in Opp. at 10-11). We should note, however, that the District Court did not err, as the *Nation* contends, by considering whether the news was "hot." The *Nation*'s principal contention in the trial court was that its use was fair because the news was hot. (*See, e.g.*, Navasky, TR, JA 280, 316-316h). The *Nation* should not be heard to complain that the judge conducted a trial on the contentions it advanced. In any event the conclusion of the District Court in this case was that the article was "not such news, 'hot' or otherwise, as to permit the use." (B 8) (emphasis supplied).

Nor did the District Court make a subjective evaluation of the journalism. The District Court in a footnote noted that "according to one of The Nation's own witnesses, a failure to check is poor journalism." (B 17). The District Court obviously did not consider this passing comment crucial to its decision. And the District Court's analysis of the "hotness" of the news simply referred to the objective fact that what the *Nation* believed was the news value of the piece at the time it published had in fact been extensively covered in the press. (B 7; Finding 45, C 25-26). It was not new in the journalistic sense, as Mr. Navasky himself conceded. (Navasky, TR, JA 348).

E. The Errors by the Majority Caused it to Reject Important Fair Use Determinations by the District Court

In evaluating the third and fourth fair use factors, the District Court found that the "Nation took what was essentially the heart of the book" and that the "Nation's extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright." (B 8).

The majority rejected these findings because they were colored by the erroneous "totality" analysis. (A 28). In fact, however, as we have demonstrated the District Court applied the correct standard of copyrightability. Since no challenge was made to these findings, other than the erroneous claim that an

improper standard was applied, the findings should have been affirmed.

F. The Determination by the District Court That the Use Was Not Fair Should Have Been Affirmed

Given the undisputed facts of this case—the extensive use of expression from an unpublished manuscript, with no contribution by the user, with no benefit to society, and with an adverse economic impact on the copyright owner—the District Court's conclusion that the use was unfair should have been affirmed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW, PUBLISHERS, INC., and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—v.—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PEN AMERICAN CENTER, *AMICUS CURIAE*

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In the
Supreme Court of the United States
October Term, 1984

HARPER & ROW, PUBLISHERS, INC., and THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

v.

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PEN AMERICAN CENTER, AMICUS CURIAE*

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* Letters of consent to the filing of this brief have been filed by all parties with the Clerk of the Court.

INTEREST OF AMICUS

PEN is an international organization of writers dedicated to preserving freedom of expression and the right to write without fear of censorship or government harassment. PEN American Center is a member of International PEN, which has headquarters in London and centers in over 60 countries. Notable cases in which PEN American Center has actively participated include Korean poet Kim Chi Ha, Yugoslavian writer Mihajlo Mihajlov, and Kenyan novelist Ngugi wa Thiang'o. Members of PEN have engaged in missions to government officials and prison authorities, have submitted letters and legal papers, and have participated in public protests on behalf of imprisoned writers.

PEN American Center has a deep and keen interest in the questions presented by this lawsuit. As an organization of 1,800 professional authors, PEN American Center is and has been actively concerned with the protection of the copyrights of authors. PEN American Center also has an ongoing interest in insuring that the availability of information to the public is maximized at all levels so that there can be informed public debate as to government decision-making.

Accordingly, shortly after this suit was filed, PEN American Center sponsored an open meeting at which representatives of the petitioners and the respondents spoke and presented their views. There was extensive debate,

discussion, and questioning about the legal and policy issues involved. At that time, PEN American Center decided that in its view the balance struck between copyright protection and protection of free expression (as set forth both in the fair use doctrine and the First Amendment) should lead to a determination that the Nation had not violated the copyright laws as a result of its reporting about the Ford manuscript.

PEN American Center is particularly concerned about the control by our government and its officials over information. It believes that high officials of government may not claim property rights either in materials generated by them while serving as

public employees or over the information they learned in that capacity. PEN American Center believes that the copyright laws should not be applied beyond their legitimate limits and that copyright should not be extended to materials, conversations, and writings that may not "belong" to anyone and, in particular, do not "belong" to the petitioners.

PEN American Center believes that writers should be free to challenge present or former government employees who discuss their activities while in office, to make use of the same information as that disclosed in official memoirs, and to describe the incidents, conversations, or events in those memoirs as a predicate to their own

writings on the subject. A proper analysis of copyright law does not and cannot grant any monopoly to memoir writers in those events.

For these reasons, PEN wishes to present its views in the following pages. Specifically, this brief is directed to two crucial issues: (1) what copyright claims may be made with respect to government documents or to conversations had by government employees acting within the scope of their offices and duties; (2) what copyright claims may be made with respect to the government official's description of events, incidents, or facts in which he participated. It is the position of the PEN American Center that no copyright claims can be made in

the first category and that copyright claims in the second area are extremely limited.

ARGUMENT

POINT I

NEITHER PRESIDENT FORD NOR ANY PERSON CLAIMING BY, THROUGH, OR FROM HIM CAN ASSERT COPYRIGHT IN GOVERNMENT DOCUMENTS OR IN OFFICIAL CONVERSATIONS BY OR BETWEEN GOVERNMENT OFFICIALS

The Nation article at issue here contains 2,250 words. Of that total, 785 words quote from President Ford's unpublished manuscript. At first blush, that proportion, 30 percent, seems high. But it is a false comparison. Upon further analysis, it appears that well over half of the 785 words -- 451, in fact* -- are either government

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* See Addendum A to the Defendant's Post-Trial Memorandum. (Joint Appendix ("JA") at 603-625)

works or noncopyrightable conversations. In these categories belong the following: (1) government documents (the Ruth memorandum relating to possible criminal prosecution of former President Nixon; then Vice President Ford's written statement to Haig about Nixon's resignation); and (2) contemporaneous conversations by government officials to Ford relating to their governmental functions.* Since neither President Ford nor any of the petitioners can claim copyright in any of these materials, there remains a total of only about 300 words quoted in the article as to which ownership interest may be asserted by the petitioners.

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* The court below held that Ford's report of his own conversations at the time was subject to copyright. No objection is made to that holding.

A. Government Documents

The Ruth memorandum and Mr. Ford's written statement to Haig were government documents prepared by government employees on government time as part of their official duties. Mr. Ruth was acting as a special prosecutor making recommendations to his superior and evaluating the desirability of prosecuting or not prosecuting Mr. Nixon. Vice President Ford's written statement was not a personal letter but an official policy statement relating to his status as Vice President and heir-apparent to the Presidency on the issue of discussing a pardon for Mr. Nixon.

The court below found that the Ruth memorandum could not be copyrighted by Mr. Ford since it did not

originate with Ford and therefore did not meet the test of "originality" found in Section 102(a) of the Copyright Act, 17 U.S.C. § 102(a) (1982). 723 F.2d at 205. Amicus endorses that proposition. In addition, amicus believes there is another basis for denying copyright to the Ruth memorandum that is also applicable to Ford's written statement. Each of these documents constitutes a "work of the United States Government" as defined in Section 101 of the Copyright Act, 17 U.S.C. § 101 (1982): "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties." Under Section 105, 17 U.S.C. § 105 (1982), copyright protection would not be

available for either of these works.*

It makes no difference that the works in question were "presidential

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* Petitioners argued below that because the works were created before the effective date of the new Act, January 1, 1978, Section 9 of the 1909 Act, which refers to "publications" of the United States Government, and not Section 105 of the new Act, is applicable. Since the works at issue were not "published," there is no government ownership, they claim. That argument is directly contradicted by Section 301(a) of the new Act, 17 U.S.C. § 301(a) (1982), which declares that all rights within the scope of copyright "whether created before or after" January 1, 1978 are governed by the new Act. Since the cause of action here accrued after January 1, 1978, the new Act must apply to define the scope of government works. See Meltzer v. Zoller, 520 F. Supp. 847 (D.N.J. 1981). Even if old Section 9 applied, however, petitioners could not claim rights in the documents under normal rules of copyright ownership. See discussion in the text.

materials," as opposed to other types of government works. As the following discussion will show, recent legislation and court decisions confirm the proposition that Presidents of the United States own neither the physical materials generated during their term of office nor any copyright in those materials.

It is true that for a period of approximately 150 years, Presidents of the United States routinely took their Presidential documents with them when they left office. This alleged "custom" led Attorney General William Saxbe to issue an Opinion of the Attorney General -- heavily relied upon below by the petitioners -- to the effect that President Nixon "owned"

all forty-two million documents generated by all executive department officials in the five years he served as chief executive. 43 Op. Att'y Gen., No. 1 (Sept. 6, 1974).

Neither the custom nor the opinion spoke to copyright in Presidential materials but dealt only with the physical materials themselves. Copyright law has always made a distinction between the two. See 17 U.S.C. § 202 (1982). Even assuming that the two concepts should be treated the same way, neither the "custom" nor the Attorney General's opinion can alter the legal rule embodied in Section 105 and firmly established by the case law on the subject.

First, custom in and by itself is not enough to establish a rule of law. Powell v. McCormack, 395 U.S. 486, 547 (1969); Nixon v. Sampson, 389 F. Supp. 107, 131 (D.D.C.), vacated on other grounds sub nom. Nixon v. Richey, 513 F.2d 430 (D.C. Cir. 1975).

Second, the Attorney General's opinion, generated under highly questionable circumstances,* has been repudiated by the only court that examined it,** rejected by a Presidential commission appointed to study the

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* See Nixon v. Administrator of General Services, 408 F. Supp. 321, 331 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977). See also Presidential Records Act of 1978: Hearings on H.R. 10998 Before the House Committee on Government Operations, 95th Cong., 2d Sess. at 318 (hereafter "Presidential Records Act Hearings").

** See Nixon v. Sampson, supra, 389 F. Supp. at 132-145.

problem,* roundly condemned by historians and writers,** and explicitly overturned by Congress when it passed two laws on the subject, the Presidential Recordings and Materials Preservation Act, 44 U.S.C. §§ 3315 et seq. (1982), and the Presidential Records Act of 1978, 44 U.S.C. §§ 2107, 2108, 2201 et seq. (1982). Both Acts reject the theory of Presidential ownership of documents produced within the scope of

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* National Study Commission on Records and Documents of Federal Officials, Final Report 80 (1977) (hereafter "Final Report"): "By all essential criteria the materials produced [the records and documents of the President's Office] have been 'Public Records' and were the property of the Federal Government . . ."

** Final Report at 112-129; see also Presidential Records Act Hearings at 256, 361, 245.

the Presidential office. The first law, dealing specifically with the Presidential materials of Richard Nixon, was upheld by this Court in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The second law relates to all Presidents and Vice Presidents inaugurated after January 20, 1981, in order to avoid a separation of powers problem.*

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* The Report of the House Committee on Governmental Operations on the Presidential Records Act of 1978, H.R. Rep. No. 94-1487, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5732, 5738-39, stated:

> The principle issue and the one on which all of the witnesses were in agreement, was that action should be taken by Congress to declare a Presi-

(Footnote continued on next page)

(Footnote continued from preceding page)

> dent's official records the property of the United States. No definitive legal decision is currently available concerning the ownership of these papers. This is largely because, with the exception of the Nixon Presidential materials, the nearly 600-year [sic] tradition of Presidents removing their papers has never been seriously challenged. On policy grounds, however, the witnesses were in general harmony that that which is generated, created, produced or kept by a public official in that administration and performance of the powers and duties of a public office belongs to the Government and may not be considered private property of the individual.

(Footnote continued on next page)

The theory behind, and the principle of, those laws is precisely the same as that involved here: namely, that Presidents who act on behalf of and for the welfare of the people cannot take financial advantage of their office by retaining personal ownership of documents or claiming incorporeal literary rights created during their Presidential terms and as part of their Presidential duties. If a President writes a memorandum to his Secretary of State as part of his duties, the United States must own both the document and

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(Footnote continued from preceding page)

This report belies any notion that the Presidential Records Act was an implied recognition of President Ford's property rights in his Presidential materials.

the copyright in the document. That principle is not the law only now since the passage of the Presidential Records Act of 1978 and the Copyright Act of 1976; it always was the law.

Case law on the subject is directly counter to the Attorney General's Opinion. The holding of Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), an early case of Justice Story sitting on circuit, does not support petitioners' claim to copyright in Presidential materials. What was at stake in that case were primarily private letters written by President Washington and claimed by his heirs. Justice Story pointed out that government documents could be treated differently:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. (Id. at 347)

Thus, the Folsom case recognizes government ownership of copyright in

"official letters," contrary to the Saxbe opinion.

In later cases involving government documents, it has been consistently held that the physical documents and the copyright must be owned by the government employer rather than by the government employee. Under the most elemental principles, an employer who supports the work product of his employees has a right to the fruits of their labor. This rule applies to intellectual as well as physical creations. For example, under both common law rules and federal copyright law, an employer is presumed to have the exclusive right to a work created by his employees within the scope of their employment. Scherr v. Universal Match

Corp., 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970); Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 567-68 (2d Cir. 1966); Nelson v. Radio Corp. of America, 148 F. Supp. 1, 3 (S.D. Fla. 1957); Sawyer v. Crowell Publishing Co., 46 F. Supp. 471, 473 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir.), cert. denied, 323 U.S. 735 (1944).

This principle applies with equal or greater force to government employees. For example, in Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865, 881 (1874), the Virginia Supreme Court of Appeals held:

> Whenever a written record of the transactions of a public officer in his office, is a convenient

> and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document -- a public record belonging to the office and not the officer; is the property of the state and not of the citizen; and is in no sense a private memorandum. (Emphasis added)

Similarly, the federal courts have recognized that the federal government is the sole owner of any written records or work created by government employees in the discharge of, or within the scope of, their public duties. Haas v. Henkel, 216 U.S. 462, 477-80 (1910); Scherr v. Universal Match Corp., supra, 417 F.2d at 500; United States v. First Trust Co., 251

F.2d 686, 688 (8th Cir. 1958); Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444, 448 (D.D.C. 1967); United States v. Chadwick, 76 F. Supp. 919, 923 (N.D. Ala. 1948); Sawyer v. Crowell Publishing Co., supra, 46 F. Supp. at 473.

The litigation in United States v. First Trust Co., supra, concerned the ownership of rediscovered documents principally written by William Clark describing his exploratory expedition with Meriwether Lewis. The expedition had been commissioned by President Jefferson, and the court plainly stated that "[i]f Clark's notes are the written records of a government officer executed in the discharge of his official duties, they are public documents

and ownership is in the United States." 251 F.2d at 688.

In United States v. Chadwick, supra, the defendant, who had been employed as an inspector by the Department of Labor, attempted to retain certain materials after he left his government position. The court plainly stated that "[t]he notes, memoranda, statements and other material made and taken by him in the course of said employment, were and are, the property of the Government," 76 F. Supp. at 923, and ordered the defendant to return all such materials.

Only where the fruits of an official's labors are clearly produced outside the scope of his government duties may he assert ownership. In Public

Affairs Associates, Inc. v. Rickover, supra, the ownership of certain speeches made by Vice Admiral Rickover was at issue. The court, noting that the speeches were written at the Admiral's home during his leisure time and that he was not on duty or acting in an official capacity when he delivered the speeches before private audiences, upheld Rickover's ownership and found that the speeches were not publications of the government. The principle must be the same with regard to high federal officials, including the President of the United States. The President, of course, is a public servant and is not above the law. His claim to ownership of documents in his possession or to copyright is no greater than that of other officers and agents of the government.

Our system of government does not permit any one man to stand above others, for all are equally bound by the Constitution and laws of the United States.* Unlike in a monarchy, the President's powers derive solely from the elected trust placed in him by the people; they do not inure to him as an individual.** Sovereignty resides in the people, and the President serves as their agent to take care that the laws

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* The Supreme Court has affirmed that "[a]ll the officers of the government, from the highest to the lowest, are creatures of the law. . . ." United States v. Lee, 106 U.S. 196, 220 (1882).

** See Debates in the Federal Convention of 1787 as reported by James Madison, reprinted in Documents Illustrative of the Formation of the Union of American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. at 131-46 (1927).

are faithfully executed. U.S. Const. art. II, § 3. The President is an employee of the people; even as head of the Executive Branch he is an employee of the government. As the Court of Appeals stated in Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973) (per curiam):

> Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . . ." Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

> (Emphasis added; footnotes omitted)

These principles were tested when former President Nixon asserted that he owned the forty-two million documents generated during his administration and could personally dispose of those documents as he wished -- a claim similar to that made by petitioners here that President Ford owns copyright in all government documents generated during his term of office, even those written by others. In the one court decision dealing directly with the issue, Nixon v. Sampson, supra, Judge Richey rejected claims to ownership of the documents in question. Although Judge Richey's decision was subsequently vacated on the ground that he was obliged to consider first certain

statutory claims relating to the ownership of Nixon's Presidential documents, the reasoning of the case is persuasive on the points at issue here. Judge Richey accepted the basic principle urged here:

> It is a general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official. United States v. First Trust Co. of St. Paul, 251 F.2d 686, 688 (8th Cir. 1958), aff'g First Trust Co. of St. Paul v. Minnesota Historical Soc., 146 F. Supp. 652 (D.Minn. 1956), wherein the Court of Appeals set forth the well-settled principle that:
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> > "[R]ecords of a government officer executed in the

> > discharge of his official duties . . . are public documents and ownership is in the United States." (389 F. Supp. at 133)

He noted that the principle is the same when questions of copyright are raised (389 F. Supp. at 134-35):

> This principle has also found expression in cases involving the question of whether a document or other material generated by a public official is outside the scope of his duties and therefore susceptible to copyright. The most well-recognized case in this area is that of Public Affairs Associates, Inc. v. Rickover, 109 U.S.App.D.C. 128, 284 F.2d 262 (1960), rev'd and rem'd, 369 U.S. 111, 82 S. Ct. 580, 7 L.Ed.2d 604 (1962), on remand, 268 F. Supp. 444 (D.D.C. 1975). . . . The determination was to be made

by ascertaining whether the speeches were prepared "in relation to the Vice Admiral's official duties," after careful examination of the "nature and scope" of the duties of the office. Id. at 113, 82 S.Ct. at 582. On remand, the district court finding that the use of government duplicating machinery, government paper, and the services of a government secretary not determinative, held that the speeches were not "written and delivered as a part of Admiral Rickover's official duties" and, therefore, were susceptible to copyright. 268 F. Supp. at 456 (footnote omitted).

Judge Richey found that Mr. Nixon's position as President did not change the result:

> Art. II, Sec. I, cl.1 of the Constitution provides that: "The exclusive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows . . . ."
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> * * *
>
> These sections of Article II compel only one conclusion: the powers and duties of the executive inure to the Office and not to any individual office-holder; for the President, although elected to the highest office in the Nation, is but a transient holder of the public trust. (Id. at 135-136.)

Judge Richey found that the Emoluments Clause of the Constitution also required this result:

> Further, not only must former President Nixon's claim of ownership be rejected as contrary to the nature of the office, but also because it is expressly negated by the

Constitution itself. Art. II, Sec. I, cl.6, generally known as the Emoluments Clause, provides that: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." Since the materials in question are directly related to the performance of the Office of the President and are of incalculable value, it would be contradictory to and a violation of, the Emoluments clause for a President to be given or to be permitted to assert a personal right to such materials.

Moreover, it was the intent of the framers of the Constitution to prevent the Office of the President from being a position of both power and profit. While they recognized that they could not divest the

office of power, they sought to prevent the corruption of the office by removing profit. They feared that if the office offered both power and profit, the persons who sought the office would "not be the wise and moderate, the lovers of peace and good order, the men fittest for trust." 1 Farrand, The Records of the Federal Convention of 1787, at 82 (as recorded by Madison) (rev. ed. 1937). (Id. at 136-37.)

Thus, no copyright may be claimed in government documents quoted by President Ford in his memoirs, and they may be reproduced by anyone.

Furthermore, as the court below found, much of the information in the Nation article (excluding the Ruth memorandum and the written statement to Haig) was presented by President Ford before the Hungate Committee and was

subsequently printed in official hearings of that Committee. Pardon of Richard M. Nixon and Related Matters, Hearings before Subcommittee on Criminal Justice of House Committee on Judiciary, 93d Cong., 2d Sess. 90-151 (1974). "This material was a 'work of the United States Government,' 17 U.S.C. § 105, and hence not copyrightable." 723 F.2d at 205 (footnote omitted). Thus, the principles cited above remove the major portion of the material cited in the Nation article from copyright protection.

B. Conversations of Others Reported by President Ford

Petitioners also claim copyright in conversations of other government officials* with President Ford during

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* There is also one conversation reported by a non-government offi-

(Footnote continued on next page)

his term of office and later reported in his memoirs. Copyright in these conversations cannot be claimed by petitioners for three additional reasons: (1) Ford's reporting of other persons' conversations was not "original" with him within the meaning of Section 102; (2) the conversations were never "marked off" from the ordinary stream of speech and are now copyrightable by no one; (3) even if they were "marked off," petitioners cannot claim copyright in them.

Section 102(a) of the Copyright Act grants copyright protection to

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(Footnote continued from preceding page)

cial, Ron Ziegler, at the time a personal aide to ex-President Nixon.

"original works of authorship." If an author only records the conversations of other persons, he is not engaged in the creation of an original work of authorship. He is simply transcribing what others have said. As the First Circuit said in Lipman v. Massachusetts, 475 F.2d 565, 568 (1st Cir. 1973), "Since transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product." The court below applied that basic proposition in ruling that Ford's reporting of other conversations cannot be copyrighted. "Moreover, the use of conversations attributed to other persons cannot be a borrowing of copyrighted material, because of the Act's requirement, 17 U.S.C. § 102(a), that

an author's work be his own and not originate in others." 723 F.2d at 205 (footnote omitted).

In addition, in Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 349, 244 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968), the New York Court of Appeals stated that oral conversations might well be original and creative enough so that the "principal speaker" might assert common law copyright in them. But even as to such statements, "it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech . . . ."

There is nothing to indicate that any of the persons quoted by President

Ford -- Messrs. Haig, Hartmann, Kissinger, Becker, Ziegler -- meant to "mark off [their] utterances" from the ordinary stream of speech. Their brief conversations reported in the article were short statements of fact or rejoinders to statements by President Ford* -- unlike the lengthy literary quotations of Hemingway to Hotchner which the New York Court of Appeals still found unprotectable. They simply cannot fit within the exceptions noted by the court.

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* Among the conversations reported were the following: Haig: "ride it out"; Hartmann: "silence implies assent"; Nixon: "He'd be excellent"; Kissinger: "It is my job to get along with you and not yours to get along with me".

Furthermore, it is impossible to see how President Ford can claim ownership of other people's words spoken to him. Those words were "owned" either by the United States government (since they were uttered as part of the individual's official duties) or by the individuals themselves (i.e., Ziegler), insofar as they could pass the Estate of Hemingway test. Since there is no proof of any transfer of copyright from the "principal speaker" to Ford and thence to petitioners, they cannot assert any claims based on use of those conversations.

Harris v. Miller, 50 U.S.P.Q. 306 (S.D.N.Y. 1941), is not to the contrary. That case was based on the protection accorded authors of historical

works who reconstruct or make up conversations that may or may not have occurred in the form found in the book. Thus, Frank Harris' selective recreation of a conversation years before with Oscar Wilde containing bon mots and repartee may well have been Harris' invention and reflected creative dimensions absent from this case.

In this case, great care was taken to be as accurate as possible and to report the conversations precisely. Trevor Armbrister, the professional writer who assisted Mr. Ford, checked with the original participants (Tr. 104)* and transcribed his interviews with them (Tr. 103). This

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* "Tr." indicates a citation to the trial transcript in this case.

accurate transcription belies any notion that the conversations were made-up recreations by Ford in which he may own copyright.

POINT II

PETITIONERS HAVE ONLY A LIMITED COPYRIGHT IN THE DISCUSSION OF FACTS OR INFORMATION CONTAINED IN THE FORD MEMOIRS

The Ford manuscript and memoirs contain many items of information and fact, some disclosed previously, some known only to a small group of historians and political experts, and some known only to the writer. Mr. Ford himself reveals information told to him by others on the political scene.

Copyright law does not grant to Ford a monopoly over those facts, whether previously known or not. For

example, Mr. Ford writes that "Washington Attorney Edward Bennett Williams was my first choice [for head of the C.I.A.]."* The Nation article states: "Washington lawyer Edward Bennett Williams, a Democrat, was his choice for head of the C.I.A." Elsewhere Ford wrote: "Now [Haig] came to the point: 'Are you ready, Mr. Vice President to assume the Presidency in a short period of time?'" (Manuscript, p. 4) The Nation article reads: "General Haig revealed that the newly transcribed White House tapes were the equivalent of the 'smoking gun' and that Ford should prepare himself to become President."

---

* The citation is to the manuscript of A Time to Heal, Plaintiffs' Trial Exhibit, No. 1 (hereafter "Manuscript"), p. 491.

These two typical examples show the lack of merit in petitioners' copyright claims. The Nation was free to report the fact that Ford wanted to select Edward Bennett Williams to become C.I.A. director. There are only a limited number of ways in which one can report that item of information: "Ford wanted to pick Williams as C.I.A. director"; "His first choice for C.I.A. head was Williams"; "Williams was at the top of the list for C.I.A. head."

According to petitioners' theory, however, all of these alternative statements are "paraphrases" of Ford's "expression" and therefore constitute copyright infringement. To accept this theory is to give Ford and petitioners a monopoly over all the facts in the

Ford memoirs, contrary to explicit declarations in the Copyright Act that grant no copyright protection to the "idea" or "discovery" embodied in the work (17 U.S.C. § 102(b) (1982)).

The Ninth Circuit, in a recent case dealing with copyright protection of factual material, Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984), wrote:

> Factual works are different. Subsequent authors wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression. For example, Landsberg's work states that "[t]he poor player simply attempts to make as many points as possible each turn." The idea contained in that statement cannot be expressed in a wide

> variety of ways. Just about any subsequent expression of that idea is likely to appear to be a substantially similar paraphrase of the words with which Landsberg expressed the idea. Therefore, similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed. 1 M. Nimmer, Nimmer on Copyright, § 2.11[A]-[B] (1968).

The court below properly found that the historical information recounted in the Ford memoirs could not be copyrighted and therefore could be used and paraphrased by any subsequent user. It should be noted that petitioners' theory would enable the original participant in an historical event to assume complete control over the facts described simply by adding his

own impressions of that event or by referring to his "state of mind." If anything, an original participant should have less protection for such descriptions because his work becomes the only source of that information, unlike a secondary work by an historian, which may draw from other source material. The descriptions of historical events by government participants must be open material; commentators should be free to describe, comment on, and criticize the governmental acts involved without fear of copyright infringement actions that would result from petitioners' theory.

Petitioners' argument in this area is contrary to case law on the subject that gives a limited copyright to works

dealing with historical facts. To cite just two recent examples, the Second Circuit held in Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980):

> A grant of copyright in a published work secures for its author a limited monopoly over the expression it contains. The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of

> copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain. As the case before us illustrates, absent wholesale usurpation of another's expression, claims of copyright infringement where works of history are at issue are rarely successful.*

---

* The analysis utilized by the court in Hoehling is clearly applicable to this case. Whether or not the article is considered by this Court to make an independent "contribution [ ] to recorded knowledge," 618 F.2d at 980, the essential holding of Hoehling is that the first author has no copyright monopoly over the facts and information contained in his work. Unlike the fair use test, there is therefore no overall evaluation of the equities since plaintiffs cannot show a protectible interest ab initio in that material. See discussion in text.

Similarly, in Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981), the Fifth Circuit held that the trial court had improperly instructed the jury that "research is copyrightable", and a verdict in plaintiff's favor had to be reversed. The court explained the general principles as follows (650 F.2d at 1368):

> It is well settled that copyright protection extends only to an author's expression of facts and not to the facts themselves. . . . This dichotomy between facts and their expression derives from the concept of originality which is the premise of copyright law. Under the Constitution, copyright protection may secure for a limited time to "Authors . . . the exclusive Right to their respective Writings." U.S. Const. Art. I, § 8, cl. 8, An "author" is one "to whom anything

> owes its origin; originator; maker; one who completes a work of science or literature." Burrow-Giles Lithographic Co, v. Sarony, 111 U.S. 53, 58, 4 S.Ct. 279, 281, 28 L.Ed. 349 (1884). Obviously, a fact does not originate with the author of a book describing the fact. Neither does it originate with one who "discovers" the fact.

The court noted that even in the so-called directory cases, copyright protection is given only to the "selection and arrangement" of factual material (id. at 1369), but "[c]opyright protection does not extend to the facts themselves, and the mere use of the information contained in a directory without a substantial copying of the format does not constitute infringement" (id. at 1369-70). The court noted that "news" is given even less

copyright protection than directories (id. at 1370):

> For example, the labor involved in news gathering and distribution is not protected by copyright although it may be protected under a misappropriation theory of unfair competition. International News Service v. The Associated Press, 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918). In the International News case, the Supreme Court commented in dicta that while a newspaper story, as a literary production, can [be] copyrighted,
>
> > "the news element -- the information respecting current events contained in the literary production -- is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the

> framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."

These cases illustrate the approach that should be taken in a case of this kind. Absent the taking of the structure, format, or "plot" of a factual work (see Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686 (S.D.N.Y.), aff'd per curiam, 500 F.2d 1221 (2d Cir. 1974)), subsequent works are free to use any or all of the information and factual material in an earlier work. Since facts are expressed only in words, and generally in a limited number of ways, the

subsequent users should be allowed to describe these facts through words that are adequate and appropriate for conveying the underlying information. That is all the Nation did. Contrary to petitioners' assertion, any "paraphrasing" used to describe the facts in the manner indicated above is not an infringement under copyright law.

CONCLUSION

For the reasons stated above, copyright protection should not be granted to the category of material falling within the discussion above.

Dated: New York, New York
August 20, 1984

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No. 83-1632

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,
Petitioners,

v.

NATION ENTERPRISES and
THE NATION ASSOCIATES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE GANNETT COMPANY, INC., LOS ANGELES TIMES, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY AND THE WASHINGTON POST, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1632

HARPER & ROW PUBLISHERS, INC. and
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v.

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THE NATION ASSOCIATES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE GANNETT COMPANY, INC., LOS ANGELES TIMES, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY AND THE WASHINGTON POST, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

THE INTEREST OF *AMICI CURIAE*

Amici curiae publish general circulation newspapers and magazines. They frequently report on major political and governmental events. One of the *amici*, The New York Times Company, also owns a book publishing company. To protect their news gathering and dissemination activities, *amici* rely on the freedoms of speech and press guaranteed by the First Amendment. To harvest the benefits from the original works of authorship which are published or broadcast by their organizations, *amici* rely on the protections provided by copyright law. Accordingly, *amici* are concerned that, in the instant case, this

Court establish the proper framework for reconciling the tension between the First Amendment and the copyright law authorized by Article I, Section 8, Clause 8 of the Constitution.

The Gannett Company, Inc. publishes 85 daily newspapers throughout the United States, including the national newspaper *USA Today*; it also owns television and radio stations, and operates Gannett News Service, a national wire service, and other news and information interests. The *Los Angeles Times*, a division of The Times Mirror Company, is a daily newspaper published in Los Angeles, California; it also syndicates newspaper features and is the joint owner of a news service. Newsweek, inc., a subsidiary of The Washington Post Company, publishes *Newsweek*, a weekly news magazine distributed in the United States and abroad. The New York Times Company and its subsidiaries publish *The New York Times*, 29 other newspapers and four magazines; it operates a news service and it owns television and radio stations as well as the book publishing company noted above. The Washington Post is a division of The Washington Post Company and publishes *The Washington Post*, a daily newspaper. It also syndicates columnists and contributes its newspaper material to a wire service and various electronic data base services.

INTRODUCTION: REPORTING THE NEWS

In this case, this Court is asked to resolve the tension between the First Amendment's protection of news reporting on political and governmental events of national importance and the protection afforded under the Copyright Act to nonfiction works written by former high public officials. Before advancing a framework for resolving the tension between the exercise of First Amendment rights and the protections of the copyright statute and applying that framework in this case, *amici* news organizations wish to stress several points about the gathering and dissemination of news. They do so in the hope that this Court's decision in the instant case will sustain

time honored practices of the media which help ensure a full and free flow of information to the public and which are essential to the functioning of our constitutional democracy.

First, news is as likely to be based on books and manuscripts as on speeches, press releases, hearings or other events. Indeed, the subject of *The Nation* article was clearly important news. The article reported President Ford's account of two of the most searing events of recent times: the resignation of President Nixon and his pardon by Mr. Ford. Moreover, at the time the article appeared in April, 1979, both Mr. Ford and Alexander Haig, who was also featured prominently in the article, were considered serious contenders for the 1980 Republican nomination. See Appendix A to Petition for Writ of *Certiorari* [hereinafter "App.A"] at A8. It has long been recognized that protection of free speech about, and free press reporting on, issues of governmental and political affairs is a "major purpose" of the First Amendment. *See, e.g., Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).

Second, in their news columns, news organizations do not customarily add their own "independent commentary." See Petitioners' Brief [hereinafter "Pet.Br."] at 5. They do bring to bear their own news judgment in selecting and organizing material so as to highlight what they consider the most important or newsworthy information. For example, the American Society of Newspapers Editors' Code of Ethics, Canon IV, calls for a "clear distinction" between news reporting and the expression of opinion, commentary, and advocacy traditionally reserved for the editorial page. *See Code of Ethics in Journalism: Readings in the Mass Media*, 22 (A. Kirschner & L. Kirschner, eds. 1971). Petitioners' claim that *The Nation*'s failure to add independent commentary to the article makes the article a "non-productive use," Pet. Br.

at 5, 34-38, not only misconceives the historic separation between news columns and editorial pages but it also fails to recognize the selection and highlighting function that is a key aspect of news reporting.

Third, once news organizations receive newsworthy information that is authentic, they will generally publish or broadcast their independently selected and organized report of that information as soon as possible. The possibility that the information might be disseminated at some time in the future by someone else is a stimulus, not a bar, to immediate dissemination, given the importance in a democracy of the media's role in bringing important information about public affairs to the people as soon as possible.

Fourth, innumerable news stories are based on unsolicited documents and information. The test for dissemination in such circumstances is not the motive of the third party who provided the unsolicited document but whether the information contained in the unsolicited document is authentic and newsworthy.

In this case, *The Nation* determined that the unsolicited material it had received was clearly newsworthy. It worked intensively to select and highlight what, in its judgment, was the most newsworthy information from a lengthy manuscript. It presented the material in a straightforward way without adding editorial or other commentary on the manuscript. Satisfied with the authenticity of Mr. Ford's account, it published with the conviction that its article would contribute to public discussion of the issues reported. Joint Appendix at JA283-JA287. In sum, *The Nation*'s news reporting was generally consistent with news gathering and dissemination practices followed by the journalism profession.

SUMMARY OF ARGUMENT

In determining whether a newspaper or magazine article constitutes copyright infringement of another work, courts must ask first, as the Court of Appeals properly did, what material taken for the article was copyrightable. In answering that question, courts should apply important statutory doctrines that mediate between First Amendment rights and the interests protected by the Copyright Act: ideas, as opposed to the form of expressing those ideas, are not copyrightable; facts, as opposed to the form of expressing those facts, are not copyrightable; works of the United States are not copyrightable; and material not original to the author is not copyrightable. These statutory doctrines—especially the distinctions between ideas and expression and between facts and expression—should be applied so as to avoid questions of First Amendment violations.

The Court of Appeals properly applied those doctrines in concluding that only 300 words of President Ford's memoir as reported in *The Nation* article were copyrightable by petitioners. In particular, under the appropriate rules for a non-fiction work, *The Nation*'s summarizing and paraphrasing of certain ideas and facts described in President Ford's memoir did not constitute a copying of copyrightable material because there was not substantial similarity to the actual expression used by Mr. Ford and because the article did not mimic the structure of the memoir but was instead an original arrangement and selection of material which drew on widely disperate passages from a lengthy manuscript.

With respect to the approximately 300 copyrightable words that did appear in *The Nation* article, the Court of Appeals properly concluded that their reproduction by *The Nation* constituted a "fair use," in important part because the purpose of the article was unequivocally "news reporting" which was explicitly recognized by the Congress as a fair use under the Copyright Act. The use was also fair because the 300 words did not appear as a single passage in either the Ford memoir or in *The Nation* article. The 300 words represent the cumulative total of various passages, each consisting of no more than

a few sentences, found throughout the Ford memoir and throughout *The Nation* article. That the Ford memoir was unpublished at the time of publication of *The Nation* article does not justify the denial or narrowing of a fair use defense, because the author had consented to imminent publication of the memoir and hence cannot claim the violation of a viable privacy interest.

ARGUMENT

I. THE PROPER BALANCE BETWEEN THE FIRST AMENDMENT AND THE LAW OF COPYRIGHT ON WHAT IS COPYRIGHTABLE: STATUTORY DOCTRINES

In approaching this case, it is important to have clearly in view the statutory doctrines which define what is and what is not copyrightable and which thus seek to mediate between First Amendment and copyright interests.

A. The Need To Balance

Read literally, the First Amendment would invalidate the Copyright Act.[1] On the other hand, since the Copyright Clause of the Constitution, Art. I, Sec. 8, Cl. 8, vests in Congress the power to enact copyright laws, it might be argued that this creates a built-in immunity from the First Amendment for copyright. Both extreme positions are obviously untenable.[2] But if copyright is

[1] 17 U.S.C. § 101, *et seq.* The First Amendment requires that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[2] This court has not read the First Amendment literally or mechanistically, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 570 (1976), *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949), *Saia* v. *New York*, 334 U.S. 558 (1948), *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931), and would not do so to abrogate copyright protection. Similarly, a "copyright exception" to the First Amendment is demonstrably specious. The First Amendment is an amendment, and hence modifies the previously adopted Constitution, including the Copyright Clause. Since the only powers of the Federal Government are those conferred by the Constitution, it is precisely those conferred powers which are limited by the Bill of Rights.

neither immune from nor invalidated by the First Amendment, then some constitutional accommodation must be found between these two competing interests.

B. The Competing Interests

This Court has on a number of occasions articulated the interest underlying copyright. For example, in *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), this Court stated:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'

Similarly, in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975), this Court observed:

> Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

In short, the purpose of copyright is to provide an incentive for author creativity, so that the public may reap the benefit of such creativity. See also, *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S.Ct. 774, 783 (1984) [hereinafter "*Sony Corp.*"].

The primary purpose of the First Amendment's freedom of speech and press clause is to enlighten the nation's citizens so that they may enjoy individual freedom, develop to their fullest potential and practice the difficult art of self-government. This "enlightenment function"[3] was summed up in Justice Brandeis' classic statement: "[F]reedom to think as you will and to speak

[3] See *Nimmer on Freedom of Speech*, § 1.02 (1984).

as you think are means indispensable to the discovery and spread of political truth . . . ."[4] As Judge Learned Hand observed, "[the First Amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many that is, and always will be, folly; but we have staked upon it our all."[5] Although the enlightenment function is fulfilled by non-political speech,[6] there is no doubt that protection of "political speech" is a fundemental goal of the First Amendment.[7] Under any definition of "political speech," the subject matter of the disputed *Nation* article—a former President's account of his predecessor's resignation and pardon—surely constitutes speech about politics and governmental affairs of the highest order.

C. Striking The Appropriate Balance: Statutory Doctrines And First Amendment Rights

To avoid a clash between the constitutional rights protected by the First Amendment and the statutory interests protected by a copyright law expressly authorized in the Constitution, important doctrines have been developed to mediate between those potentially competing interests. Many of these doctrines have been codified in the Copyright Act of 1976, and must be applied to *The Nation* article to answer the threshold question in an infringement action: what copyrightable material contained in the Ford memoir was included in *The Nation* article.

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[4] *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[5] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y. 1943).

[6] E.g., *American Federation of Labor* v. *Swing*, 312 U.S. 321 (1941) (labor communications); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (religious speech); *Schad* v. *Mt. Ephraim*, 452 U.S. 61 (1981) (entertainment).

[7] *Brown* v. *Hartlage*, 456 U.S. 45, 52 (1982). See also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838 (1978).

As will be discussed below, these statutory doctrines attempt to give ample breathing room to First Amendment rights because, if they did not, the copyright laws enacted by the Congress might themselves be unconstitutional violations of the First Amendment. Accordingly, these statutory doctrines should always be applied so as to avoid the constitutional question of whether the exercise of particular First Amendment rights must override the copyright statute.[8]

1. *The Idea-Expression Dichotomy.* It has long been recognized as a matter of copyright law that no protection may be claimed in an "idea" as distinguished from the "expression" of that idea.[9] This principle has now been codified in the current Copyright Act.[10]

A number of lower court decisions have held that the "idea-expression" dichotomy is also required by the First Amendment. By reason of the First Amendment, the copyright laws are precluded from granting a copyright in "ideas," but a copyright owner may prohibit the use by others of his "expression" without offending the First Amendment freedoms of speech and press.[11] This Court

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[8] *Wheaton* v. *Peters*, 33 U.S. (8 Peters) 591, 661-63 (1834) (protection given to copyright wholly statutory). See also *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749-50 (1961); *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982) (Federal statutes are to be construed so as to avoid serious doubts about their constitutionality).

[9] This Court has recognized that "protection is given only to the expression of the idea—not the idea itself", *Mazer* v. *Stein*, 347 U.S. 201, 217 (1954), and that "copyright laws, of course, protect only the form of expression and not the ideas expressed." *New York Times Co.* v. *United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring).

[10] 17 U.S.C. § 102(b): "In no case does copyright protection for an original work of authorship extended to any idea . . . ."

[11] *Sid & Marty Krofft Television Prods.* v. *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Wainwright Sec. Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Walt Disney Prods.* v. *Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Quinto* v. *Legal Times*

has not yet directly held that the "idea-expression" dichotomy is required by the First Amendment,[12] and should do so in this case.

The rationale for such a distinction is straightforward. A limitation whereby authors may not prohibit others from copying their abstract ideas (as distinguished from their "expression") does not discourage creativity, or otherwise retard the "Progress of Science and useful Arts." Most, if not all, writers draw from the stock of ideas of their predecessors. Professor Chafee reminded us that "'[a] dwarf standing on the shoulders of a giant can see farther than the giant himself.'"[13] If writers and other creators could not build upon the ideas of their predecessors, not only would freedoms of speech and press be abridged, but the creative processes themselves—the copyright side of the balance—would also be severely circumscribed.

Similarly, the copyright restrictions on repeating or copying "expression" of ideas comports with the First Amendment's underlying rationale for freedom of speech. It is exposure to ideas, and generally not to their particular expression, that is vital if self-governing people

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of Washington, Inc., 506 F. Supp. 554 (D.D.C. 1981); *United States* v. *Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974).

[12] But in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577, n.13, (1977), which ruled on the impact of the First Amendment on the right of publicity rather than on copyright, this Court stated in a footnote: "We note that Federal District Courts have rejected First Amendment challenges to the federal copyright law on the ground that 'no restraint [has been] placed on the use of an idea or concept.'" See also, *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1179-1180, n.2 (5th Cir. 1980) (Brown, J., concurring) (citing *Zacchini* and noting "the Supreme Court has given at least its most general approval to the 'idea-expression dichotomy' principle.").

[13] Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 511 (1945). The phrase can be traced to R. Burton, *Anatomy of Melancholy* (1618).

are to make informed decisions.[14] Accordingly, the "idea-expression" dichotomy generally represents an acceptable balance between copyright and First Amendment interests. In some degree, it encroaches upon the First Amendment in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the encouragement of creative works by means of copyright protection. In some degree, it encroaches upon the author's right to control his works in that it renders his "ideas" *per se* unprotectable, but this is justified by the greater public need for free access to ideas as part of the First Amendment's enlightenment function.

2. *The Exclusion of Copyright for Facts.* A second statutory copyright doctrine that mediates between First Amendment and copyright interests is that no copyright may be claimed in facts *per se*.[15] This result is also dictated by the limitation on Congressional copyright authority as contained in the Copyright Clause. That Clause empowers Congress to grant copyright only to "authors." One may discover a fact, but no one may claim to be the "author" of a fact.[16] Moreover, the effort expended in discovering a fact does not justify copyright protection in that fact.[17] The most significant compo-

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[14] It is not without significance that the objectives of freedom of speech and press are often said to be attained by "free trade in *ideas*." *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

[15] *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981); *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980); *Funkhouser* v. *Loew's, Inc.*, 208 F.2d 185 (8th Cir. 1953). See generally *Nimmer on Copyright*, § 2.11 (1984).

[16] "In no case does copyright protection for an original work of authorship extend to any . . . discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. Sec. 102(b).

[17] If a given fact were eligible for copyright by reason of the investigative or other efforts of its discoverer, there would be a

nents of copyright protection in a factual work relate to the literal form of expression—the actual sequences of particular words selected to describe given facts.[18] Thus, a substantial verbatim copying of such words will ordinarily constitute copyright infringement of a factual work.

The rationale for the "fact-expression" statutory doctrine is very similar to the rationale for the "idea-expression" dichotomy. The copyright interest is advanced by protecting the author's actual expression. The First Amendment interest in a full flow of information to the public is advanced by removing facts *per se* from the protection of the copyright law.[19]

Petitioners, citing the District Court's decision, ask this Court to hold that an author may copyright facts as long as he couples those facts with expression. Pet. Br. at 18-21. Petitioners' novel and misguided proposal would permit an author to acquire the exclusive right to recount a period of history by being the first to write about it—an intolerable and much criticized result.[20] There is simply no basis in copyright law for the rule

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wholly unacceptable inhibition on the marketplace of ideas. No one may claim a copyright monopoly on the facts of the Watergate incident or the experiences of the Iranian hostages, or any other fact no matter how newsworthy or historically significant. See *Miller* v. *Universal Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

[18] See cases collected in *Nimmer on Copyright*, § 2.11 [B] (1984).

[19] See *Time Inc.* v. *Firestone*, 424 U.S. 448, 472 (1976) (the truthful disclosure of facts constitutes such a vital First Amendment interest that even false statements of fact will sometimes also command First Amendment protection in order "to allow an adequate margin for error—protecting some misstatements so that the 'freedoms of expression . . . have the "breathing space" that they "need . . . to survive".' ").

[20] *See, e.g., Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598, 601 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957); *Echevarria* v. *Warner Bros. Pictures, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935); *Nimmer on Copyright* § 2.11[E], at 2-169 (1984).

advanced by petitioners the facts *per se* are copyrightable when combined with expression. Such an erroneous proposition flies directly in the face of the fundamental principle that only that which is "original" with the author may be the subject of copyright.[21] Obviously, a fact does not originate with one who "discovers" the fact. The discoverer merely finds and records. He may not claim that the facts are "original" with him, although there may be originality and hence authorship in the manner of recounting, i.e., the "expression," of the facts.

Most of *The Nation* article insofar as it is derived from the Ford memoir consists of merely the reporting of facts, and not the copying of the precise words describing those facts as contained in the memoir. See pp. 15-20, *infra*. In order to maintain that this reporting of facts *per se* constitutes copyright infringement, petitioners are forced to rely upon the "totality" theory created by the District Court. Under this theory, the noncopyrightable facts contained in *The Nation* article were somehow transmuted into copyrightable works by the circumstance that they were collected together with Ford's reflections.[22] Even if Mr. Ford's reflections were themselves copyrightable (and they are not), a noncopyrightable fact cannot be made copyrightable simply because it is "collected together with" that which is copyrightable. If this were the law, then the Copyright Act would surely violate the First Amendment since it would mean that no one could repeat facts first discovered by another as long as the first person to publish such facts were careful to juxtapose them with that which is copyrightable.

Petitioners and the District Court commit further error in applying the "totality" theory by assuming that Mr. Ford's revelations as to his state of mind while involved in governmental affairs are themselves copyrightable. President Ford's state of mind while involved in governmental affairs is no less a "fact," in itself in-

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[21] 17 U.S.C. § 102(a). See *Nimmer on Copyright*, § 2.01 (1984).

[22] Appendix B to Petition For Writ of *Certiorari* at B9-B11.

capable of copyright protection, than is the fact that he granted Mr. Nixon a pardon. For example, in the Ford Manuscript, he states: "I was angry with myself for showing cowardice in not saying to the ultraconservatives, 'It's going to be Ford and Rockefeller . . . .'" Appendix E to Petition for Writ of *Certiorari*, at E5. *The Nation* article included the following passage: "and that he regretted his 'cowardice' in allowing Rockefeller to remove himself from Vice Presidential contention." *Id.* The only identical word is "cowardice." In this passage, there is obviously a copying of fact but not of expression.[23]

3. *The Exclusion of Copyright for Works of the United States Government.* A third statutory doctrine protecting First Amendment interests is found in 17 U.S.C. Sec. 105; copyright may not be claimed in works of the United States Government. Not every oral statement uttered by a government official during his term in office constitutes a work of the United States Government for this purpose. But it is beyond dispute that any statements which were reduced to writing *during* the official's term of office or performance of governmental duties and which relate to governmental affairs should be so classified. Even without this statutory provision, the same result would be required by the First Amendment. The enlightenment function served by the First Amendment is particularly relevant to works of the United States Government, while the competing copyright interest in

[23] It is irrelevant that Mr. Ford is both the author and the subject of the revelations. Suppose someone else in writing a biography of Mr. Ford made the same statement as to Mr. Ford's state of mind vis-a-vis Mr. Rockefeller. Copyright would attach to the first author's words describing the fact that Mr. Ford regretted his decision as to a vice-presidential running-mate, but, apart from his expression, the first author could surely not claim copyright in the fact *per se* of Mr. Ford's belief that he had made a mistake. The fact of Mr. Ford's state of mind does not suddenly become copyrightable simply because Mr. Ford rather than a third party is reporting that fact.

encouraging authorship has no application to such works.[24]

4. *The Exclusion of Copyright for Material Not Original to the Author.* A fourth statutory doctrine protecting First Amendment rights in the context of copyright is the rule that there is no protection for the use by an author of the verbatim conversations of others. This is so because of the requirement of the Copyright Act that an author's work be his own and not originate in others. 17 U.S.C. § 102(a). See also, U.S. Const., Art. I, § 8, Cl. 8 (reservation of copyright to "authors").

II. APPLICATION OF THE STATUTORY DOCTRINES: MOST OF THE NATION ARTICLE CONSISTED OF UNCOPYRIGHTABLE MATERIAL

The Court of Appeals properly stated and applied the statutory doctrines defining copyrightable material to the material from the Ford memoir used in *The Nation* article.

A. General

Once the erroneous "totality" theory advanced by petitioners is rejected, see p. 12, *supra*, then it is helpful in determining what was copyrightable by the petitioners to view *The Nation* article as having used four types of material from the Ford manuscript.

(1) *The Nation* used verbatim quotations from Mr. Ford about his own impressions, thoughts, judgments and actions. These verbatim quotations—which total about 300 words—are clearly expression and thus clearly copyrightable.

(2) *The Nation* used verbatim quotations from, or descriptions of, works of the United States such as the

[24] Works of the United States Government would be produced in any event due to governmental requirements. Copyright is not needed to encourage their production. Therefore, the First Amendment interests clearly outweigh any competing copyright interests as regards works of the United States Government, so that there may never be a copyright interest in such works.

memorandum of Henry S. Ruth (then a member of the Special Prosecutor's Office), statements of Mr. Ford transcribed by the Hungate Committee and the written memorandum which Mr. Ford prepared as Vice President and read to Alexander Haig. Although these works of the United States were included in the Ford manuscript, they are clearly not copyrightable by petitioners under 17 U.S.C. § 105, and their use by *The Nation* is non-infringing.

(3) *The Nation* used verbatim quotations from the Ford manuscript which are the exact words of others being reported by Mr. Ford. These quotations are not copyrightable by petitioners due to the exclusion from copyright of material not original to the author. See p. 15, *supra*. Petitioners now attempt to argue that Mr. Ford's quotation of statements made to him by others were not verbatim quotations, but his own reconstruction of such statements. Pet. Br. at 25. But the District Court "decline[d]" to find that such statements were in fact Ford reconstructions. App. B at B11.[25]

(4) *The Nation* paraphrased or summarized Mr. Ford's own words both as to what he said, thought or did and as to his perceptions of what others said, thought or did. As a general matter, these summaries are properly viewed as a legitimate description of "facts" or "ideas" and not as an impermissible copying of "expression." This conclusion is borne out by a fair reading of the comparison of the article and the Ford memoir submitted by respondents. See Joint Appendix at JA627-JA704.

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[25] Moreover, petitioners' argument is also answered by another principle of copyright law: one who presents material as factual cannot claim, as against one who relied upon such representation, that that which was copied constituted his own authorship rather than mere fact. Mr. Ford clearly was presenting what others said as factual. See *Marshall* v. *Yates*, 1983 Copyright Law Decisions (CCH) ¶ 25,594 (C.D. Cal. 1983); *Mosley* v. *Follet*, 209 U.S.P.Q. 1109 (S.D.N.Y. 1980); *Huie* v. *NBC*, 184 F. Supp. 198 (S.D.N.Y. 1960).

As facts or ideas, these passages are, of course, not copyrightable.

With respect to this fourth type of material drawn by *The Nation* from the Ford manuscript, the petitioners raise two related arguments about the application of the statutory definitional doctrines to the facts of this case: they claim that the Court of Appeals too narrowly limited the concept of expression and too broadly defined the concept of paraphrasing (as opposed to expression). Neither of these arguments—which raise mixed fact/law questions—is well-founded as *amici* will demonstrate immediately below.

B. Expression: Selection, Arrangement and Structure

Petitioners argue that the Court of Appeals erred, as a matter of law, because it did not consider an author's arrangement, selection and structure to be part of "expression" protected by copyright. Pet. Br. at 15. Petitioners are correct that selection, arrangement and structure may be considered part of expression,[26] but they are clearly wrong that this rule was ignored by the Court of Appeals or improperly applied in this case.

First, the Court of Appeals correctly stated, App. A at A16, that:

> The distinction between fact and expression is not always easy to describe. There are, however, several general principles according to which that boundary may be mapped for works in which much factual material is described. An author's originality exists, in part, in his overall *arrangement of facts*. The *structure* he chooses for the work as a whole is important. (Emphasis supplied.)[27]

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[26] *Nimmer on Copyright*, § 2.11[E] & § 13.03[A] (1984).

[27] Petitioners misleadingly focus on the Court of Appeals' statement that, in the context of news or history, expression must be limited to "its barest elements—the ordering and choice of the words themselves." Pet. Br. at 15. But this statement clearly has

Second, the Court of Appeals then properly held, App. A at A16, that

> In this case, there can be no concern that this mode of expression was usurped; *The Nation* article drew only upon scattered parts and not the total entity with its unique and protected mosaic. (Emphasis in original.)

That the Court of Appeals correctly applied the rule to the instant case is demonstrated by the comparison of the article and the manuscript. Joint Appendix at JA627-JA704. The pages of the Ford manuscript used by *The Nation* (indicated within parentheses after the Ford text) demonstrate a selection and arrangement of disparate information by *The Nation* in a manner that did not mimic the manuscript's structure.[28]

As the Second Circuit has stated in a leading case on news reporting and copyright, "the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source." *Wainwright Securities Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (contrasting defendant's infringing use of plaintiff's copyrighted financial reports with the *Wall Street Journal*'s permissible use of those reports). Such news reporting of facts, not appropriation of expression, is precisely what occurred in this case.

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to be read as synonymous with the statement quoted above, or as dicta.

[28] It may be that an author's selection is infringed where the vast preponderance of his facts are appropriated. But here only tiny, disparate fractions of the Ford manuscript were used. Cf. *Eckes* v. *Card Prices Update*, 1984 Copyright Law Decisions (CCH) ¶ 25,672 (2d Cir. 1984) (infringement found where defendant took substantially all of the facts from plaintiff's compilation); *United States* v. *Hamilton*, 583 F.2d 448 (9th Cir. 1978) (infringement found where defendant cartographer took substantially all the facts from plaintiff's map).

C. Facts and Ideas: The Issue of Paraphrasing

Petitioners also maintain that the Court of Appeals improperly allowed virtually unlimited paraphrasing from the Ford manuscript. Pet. Br. at 21. But the Court of Appeals made a proper ruling on paraphrasing. To understand why, and to understand the status of paraphrasing in the law of copyright, one must distinguish between fictional works and factual works.

First, as to fictional works, Judge Learned Hand's famous abstractions test applies:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.[29]

The abstractions test does not, of course, dictate where in any given work the level of abstraction is such as to cross the line from expression to idea. Professor Chafee made some attempt to answer this most difficult question:

> No doubt, the line does lie somewhere between the author's idea and the precise form in which he wrote it down. I like to say that the protection covers the 'pattern' of the work. . . the sequence of events and the development of the interplay of characters . . . .[30]

In a work of fiction, this means that at some point the plot line, for example, will be sufficiently developed and specific so that a copying will be regarded as the taking of protectable "expression," even though there has been

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[29] *Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

[30] Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 513 (1945).

no verbatim copying of the actual words employed by the first author. In that context, paraphrasing may constitute copyright infringement. That is what Learned Hand had in mind when he said that copyright "cannot be limited literally to the text, else a plagiarist would escape by immaterial variations." [31] This is true because a highly developed plot line is itself a work of authorship protectable by copyright. Thus, even without copying the original words, to paraphrase a plot line can constitute a taking of "expression." [32]

But this test for fictional works is to be contrasted with the correct approach to a factual work where the so-called plot line, i.e., the sequence of events and interplay of characters, is based upon fact and not upon any author's fertile imagination. In those circumstances it is only the precise words which describe the "plot," and not the plot or sequence of events itself, which constitute the "expression" of a work of authorship. Thus, when, as here, an article describes a historical sequence of events, paraphrasing of factual information is both permissible, and, indeed, sometimes necessary. Extensive verbatim copying must occur to constitute copyright infringement, and no such copying is contained in *The Nation* article.

Of course, if the defendant extensively copied virtually the same words in a factual work as those employed by the plaintiff, but simply made certain minor changes, the plaintiff's work of factual authorship, i.e., his choice of words, has been substantially copied, and hence infringement should be found. But here (apart from the verbatim use of 300 of Mr. Ford's words discussed below under the fair use doctrine) there was a genuine restatement of facts by *The Nation* and not an almost verbatim copying of Mr. Ford's expression.[33]

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[31] *Nichols* v. *Universal Pictures Corp.*, *supra* 45 F.2d at 121.

[32] *See*, e.g., *Twentieth Century-Fox Film Corp.* v. *MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983).

[33] See *Landsberg* v. *Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984) (legitimate paraphrasing different for fictional and factual works). The cases cited by petitioners, all of which involve takings of expression, fail to undermine the Court of Appeals' conclusion that *The Nation's* paraphrasing of disparate facts did not constitute infringement of copyrightable material. See Pet. Br. 21-22. Those cases involved either the taking of virtually all of plaintiff's selection of facts, *W.H. Anderson Co.* v. *Baldwin Law Pub. Co.*, 27 F.2d 82, 88 (6th Cir. 1928), or the virtually verbatim taking of material, contiguous portions of plaintiff's pictorial and oral expression. *Flick-Reedy Corp.* v. *Hydro-Line Manufacturing Co.*, 351 F.2d 546, 548-49 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); *Wagner* v. *Meccano Ltd.*, 246 F. 603, 604 (6th Cir. 1917), *aff'g* 234 F. 912 (S.D. Ohio 1916). Petitioner's final case is inapposite since defendant's use was designed to appear to be a direct quote from plaintiff's copyrighted work. *Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938).

III. THE USE OF THE COPYRIGHTABLE MATERIAL BY *THE NATION* WAS FAIR

After correctly holding that only 300 words of the approximately 2250 word *Nation* article constituted copyrightable material, the Court of Appeals further held that *The Nation*'s use of those 300 words from the 200,000 word Ford memoir was "fair" within the meaning of the statutory "fair use" doctrine which is now codified as Section 107 of the Copyright Act. 17 U.S.C. § 107. This ruling was correct.

The doctrine of fair use—like the statutory doctrines used to define what is and is not copyrightable—seeks to reconcile the tension between First Amendment and copyright interests. As Judge Kaufman stated, the doctrine ensures a "proper balance of the citizenry's need to be informed and the author's monopoly of his original writings . . . ." App. A at A24. And just as the statutory doctrines defining what is and what is not protected by copyright should be construed so as to avoid questions of First Amendment violations, so should the statutory fair use doctrine.[34]

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[34] See *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1181 (5th Cir. 1980) (Brown, J., concurring). Section 107 provides that "[i]n determining whether the use made of a work in any particular case is a fair use" courts should consider four enumerated criteria. 17 U.S.C. § 107(1)-(4). These

In light of standard news reporting practices, see pp. 2-4, *supra*, *amici* will briefly discuss the four express criteria to be considered in a fair use analysis and demonstrate that *The Nation*'s use of the Ford manuscript was fair.

A. The Purpose and the Character of the Use: News Reporting

The introductory phrase to Section 107 includes "news reporting" as a paradigmatic example of fair use: "the fair use of a copyrighted work, including such use . . . for . . . news reporting . . . is not an infringement of copyright." 17 U.S.C. § 107. News reporting is one of the "commonly recognized" situations involving fair use. *Sony Corp.*, *supra*, 104 S. Ct. at 807 (Blackmun, J., dissenting). Since virtually all news reporting is undertaken by profit-making enterprises, the Section 107(1) suggestion that a "commercial nature" tends to negate fair use clearly has no application to genuine news reporting.[35]

Petitioners incorrectly argue that, despite its paradigmatic status as news reporting, *The Nation* article was not a "productive use," and this militates against a finding of fair use. Pet. Br. 34-35. This Court has held that the fair use defense is not "rigidly circumscribed" by the productive use requirement.[36] In any event, *The Nation*'s use *was* a productive use. A productive use involves the contribution of original elements of authorship by the person asserting the fair use defense.[37] Almost all of *The Nation* article involves legitimate paraphrasing rather than verbatim copying. Such paraphrasing is itself a work of authorship, susceptible of copyright as a derivative work.[38] Moreover, the selection and arrangement of the matters taken from the 200,000 word Ford manuscript into the 2250 word *Nation* article also constitutes a work of authorship. As noted, p. 3, *supra*, news is often based on books or manuscripts, and an essential aspect of news reporting on such works is making an independent judgment about what is important and newsworthy and organizing the news report accordingly. All of this surely adds up to a "productive use," even if a "productive use" were regarded as a condition to a fair use claim.

B. The Nature of the Copyrighted Work: Fair Use Applies to About-to-be-Published Works

This Court has stated that "[c]opying a [copyrighted] news broadcast may have a stronger claim to fair use than copying a motion picture."[39] This is a particular application of the generally recognized principle that, in analyzing the nature of a copyrighted work under the second fair use factor, copying works of a factual *nature* should be given broader leeway under the fair use doctrine than copying works of a fictional nature.[40] 17 U.S.C. § 107(2). Here, especially, the nature of the copyrighted work used (the factual memoir of a former President on, *inter alia*, the resignation and pardon of his predecessor) strongly supports the purpose of the use (news reporting).

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four criteria are not meant to be exhaustive, however. S.Rep. No. 94-473, 94th Cong., 1st Sess. 62 (1975) (statute provides "very broad statutory explanation of what fair use is and some of the criteria applicable to it . . ."); *Nimmer on Copyright*, ¶ 13.05[A] at 13-65 (1984). Nor is the failure to satisfy any one of the statutory criteria determinative that the use in question is not "fair." Rather, a court should consider all of the relevant criteria when applying the "equitable rule of reason" analysis to a particular claim of infringement. *See Sony Corp.*, *supra*, 104 S.Ct. at 792.

[35] 17 U.S.C. § 107(1) (courts, in non-news reporting contexts, to evaluate "whether such use is of a commercial nature or is for nonprofit educational purposes").

[36] *Sony Corp.*, *supra*, 104 S. Ct. at 795 n.40.

[37] See *Nimmer on Copyright*, § 13.05[A][1] (1984).

[38] See *Nimmer on Copyright*, § 3.03 (1984).

[39] *Sony Corp.*, *supra*, 104 S. Ct. at 795 n.40 (1984).

[40] See *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

In arguing against the defense of fair use under the second fair use factor, petitioners and *amici* in support of petitioners have placed great reliance upon the fact that the Ford memoir was unpublished prior to *The Nation* publication. This reliance displays a misunderstanding of the applicable principles of copyright law. First, petitioners are simply wrong in their assertion that under common law copyright (which by definition [41] consisted of actions for infringement of unpublished works) the defense of fair use was never available. See Pet. Br. at 30. They do not cite a single case which holds that the defense of fair use at common law is unavailable as to the copying of an unpublished work in circumstances where, had the plaintiff's work been published, fair use would have been recognized.[42] On the other hand, there are a number of common law copyright cases where a fair use defense was recognized for use of unpublished works.[43]

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[41] See *Nimmer on Copyright*, § 2.02 (1984).

[42] Although petitioners cite no such case, *amicus* Association of American Publishers (AAP) does purport to cite three such cases: *Press Pub. Co.* v. *Monroe*, 73 Fed. 196 (2d Cir. 1896); *Golding* v. *RKO Radio Pictures, Inc.*, 193 P.2d 153, 163 (Cal. Dist. Ct. App. 1948) *aff'd*, 221 P.2d 95 (Cal. 1950); *Stanley* v. *Columbia Broadcasting System, Inc.*, 35 Cal.2d 652, 661, 221 P.2d 73, 77-78 (Cal. 1950) (en banc). See AAP Br. at 14. In fact, the *Press Pub.* case does not deal with fair use. The defendant published the plaintiff's entire work, so that fair use would not be appropriate regardless of whether plaintiff's work had been published prior thereto. The only significance of the fact that plaintiff's work was unpublished was that this was a necessary condition to the assertion of a claim for common law copyright. The *Golding* and *Stanley* cases were decided at a time when California operated under a statute which was more restrictive than common law or statutory copyright. They are thus not relevant to the present issue. For an explanation of this earlier statute, see *Weitzenkorn* v. *Lesser*, 40 Cal.2d 778, 256 P.2d 947 (1953).

[43] See, e.g., *Hemingway* v. *Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd*, 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd on other grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968). The New York Court of Appeals in *Hemingway* found it

Second, petitioners rely upon a passage from the Senate Report on the current Copyright Act which states that the "applicability of the fair use doctrine to unpublished works is narrowly limited. . . ." [44] But this statement does not affect the valid fair use defense in this case. In the first place, the House Report never adopted this statement,[45] although it does repeat most of the other passages in the Senate Report.[46]

But even if the passage in the Senate Report were regarded as adopted by the House, it has no applicability to this case. One must look to the reason stated as to why the fair use doctrine is to be limited when applied to unpublished works. It is because "this is the result of a deliberate choice on the part of the copyright owner." [47]

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unnecessary to reach the defendant's fair use defense because of its finding of an implied license to the defendant. *Fendler* v. *Morosco*, 253 N.Y. 281, 171 N.E. 56 (1930), relied upon by petitioners because of its statement (253 N.Y. at 291) that "perhaps any use that others made of it might be unfair" (Pet. Br. at 30, but with omission of the word "perhaps"), in fact invoked a fair use concept by reason of its conclusion that defendant may prevail because "where resemblance is close the material is trivial. . ." 253 N.Y. at 294. This, in effect, is an application of the third fair use factor, which turns on "the amount and substantiality of the portion used. . ." 17 U.S.C. § 107(3). Similarly, in *Malkin* v. *Dubinsky*, 203 N.Y.S.2d 501, 507 (Sup. Ct. 1960), in holding for the defendant, the court held that "plaintiff's claims involve, at best . . . some details which in the total context are trivial." Once again, the third fair use factor was, in effect, invoked.

[44] S.Rep. No. 94-473, 94th Cong., 1st Sess. 64 (1975). See Pet. Br. at 30.

[45] The AAP Amicus Brief argues that the House in effect endorsed this position by stating its approval of prior 1967 House and 1975 Senate Reports. AAP Br. at 7. It is clear, however, that the passage supposedly stating such approval (H.R. Rep. No. 94-1476 at 67) in fact is addressed only to fair use in the classroom context.

[46] This failure to repeat the quoted passage implies a contrary intent on the part of the House. See *Sony Corp., supra*, 104 S. Ct. at 805 (Blackmun, J., dissenting).

[47] S. Rep. No. 94-473, *supra*, at 64.

The "deliberate choice" referred to is obviously not the choice that the defendant shall not publish the plaintiff's work. That is always the case when the defense of fair use is invoked. It is rather that the plaintiff has made the "deliberate choice" that the work is unpublished *and is to remain* unpublished.[48] In those circumstances, where the author intends to keep his work entirely private, as in the case of a diary or letters, the fair use doctrine may be narrowed.[49]

That, however, is not this case. The author, Gerald Ford, clearly did not intend to keep his manuscript confidential. He wished it to be read by the public. The fact that he did not wish *The Nation* to be the publisher of any of his material does not go to the issue of fair use; such opposition by the copyright holder to publication always arises in the context of an unlicensed defendant. Petitioners have made much of the fact that the Ford memoir was "soon to be published" as a reason why *The Nation* could not invoke the fair use defense. Pet. Br. at 38. In fact, as indicated above, this circumstance cuts in exactly the opposite direction. The very fact that the work was soon to be published indicates that the information contained therein was not regarded as material which the author wished to keep from the world, and hence, the defense of fair use is not barred or narrowed by the unpublished status of the work.

The reasons of "logic and policy" which petitioners offer to support the supposed fair use distinction between

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[48] It is this concept of intent to keep confidential indefinitely which is referred to in the passage from *Nimmer on Copyright* quoted by Petitioners: ". . . the scope of the fair use doctrine is considerably narrower with respect to unpublished works *which are held confidential by their copyright owners* . . . ." Pet. Br. at 31 (emphasis added), quoting from *Nimmer on Copyright*, § 13.05[A] at 13-73 (1984).

[49] The quotation from *Millar* v. *Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769 K.B.), see Amicus Brief of Volunteer Lawyers for the Arts, Inc. at 4, refers to this concept of total confidentiality and lack of intent to publish.

published and unpublished works are also easily rebutted. *Id.* at 31. Petitioners argue, first, that "an author who has published a work may be deemed to have consented to its 'fair use' by others." *Id.* This is manifestly a fiction. The applicability of the fair use defense is simply not triggered by the consent of the author.[50] The "second and more important reason" stated by petitioners to support their argument is that for an unauthorized person to be the first publisher of the author's expression infringes his right of first publication. Pet. Br. at 31. The fallacy of this argument is obvious. Unless one of the rights conferred by the Copyright Act has *prima facie* been violated (whether it be the right of first publication, the right of reproduction, etc.) there would be no occasion to raise the defense of fair use. When the defense of fair use is appropriate, it may be asserted despite the fact that there has been a literal violation of one of the exclusive rights conferred upon an author by Section 106 of the Copyright Act. Thus, Section 107, the fair use provision, begins: "Notwithstanding the provisions of section 106 . . . ." [51]

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[50] See *Nimmer on Copyright*, § 13.05 at p. 13-63 (1984).

[51] An analysis under the second fair use criterion should not consider the motives of the third person who removed the Ford manuscript from the Petitioner's possession, or the propriety of his actions. Whatever remedies might be available against such a person (e.g., for conversion, trespass to chattels, breach of a confidential relationship, or breach of the terms of a contract) can have no bearing upon the respondent's right to assert the defense of fair use. There is no evidence in the record that remotely suggests that respondents were engaged in, or aided in any manner, the taking of the manuscript from petitioners' possession. Review of an unsolicited document is a journalistic practice. See p. 3, *supra*; Epstein, "The American Press: Some Truths About Truths" in *Ethics and the Press* (J. Merrill & R. Barney, eds. 1975). To give any weight to the fact that the manuscript was given to *The Nation* unsolicited by a third party would undermine journalistic practice and thus the paradigmatic fair use of news reporting recognized by the Congress. 17 U.S.C. § 107. In addition, the mere fact that respondents had reason to know that petitioners would object to publication of *The Nation* article does not undermine their

C. The Amount and Substantiality of the Portion Used

Only "the portion used" of "the copyrighted work" is to be taken into account in determining amount and substantiality under the third fair use factor. 17 U.S.C. § 107(3). That portion used which is not copyrightable, and therefore not protected by the copyright in "the copyrighted work," is not to be taken into account in determining substantiality. Here, again, petitioners err in applying their "totality" theory. See pp. 12-14, *supra*. Thus, similarity of ideas and facts (as distinguished from their expression)—and similarity of works of the United States Government and similarity of verbatim statements of persons other than Mr. Ford—as between the article and the manuscript are not to be taken into account in determining such substantiality.

In assessing the instant case under this criterion, it will suffice to reiterate that the 300 copyrightable words quoted in *The Nation* article are a tiny fraction of the 200,000 word Ford manuscript and are not taken from any given integrated passage. They consist rather of the sum total of a line or several lines copied from numerous passages in the Ford memoir. Each passage standing by itself would clearly constitute fair use. Since they are not joined together in a single passage in *The Nation* article nor taken from a single passage in the Ford memoir and since none of the copied passages individually exceed the bounds of fair use, this Court should conclude that cumulatively the use remains "fair." [52]

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right to assert a fair use defense since, when one relies on the fair use defense, there is always reason to know the copyright owner may object to the use.

[52] This Court may take judicial notice that just this sort of quotation of passages without the consent of the copyright holder routinely occurs in book reviews. Similarly, an unauthorized biography of a famous person may well quote rather extensive passages from that person's antobiography without consent. A rule which precluded these widely-followed practices would run counter to the underlying purpose of copyright in that it would stultify other kinds of legitimate authorship.

D. The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth fair use factor, 17 U.S.C. § 107(4), often referred to as the most significant of the factors,[53] was incorrectly analyzed by the District Court precisely because of its erroneous "totality" theory. The District Court concluded: the "effect of *The Nation*'s extensive use of the Nixon pardon material caused the *Time* agreement to be aborted and thus diminished the value of the copyright." App. B at B8. But the "Nixon pardon material" referred to by the District Court as contained in *The Nation* article for the most part consisted of noninfringing paraphrases of noncopyrightable facts and ideas, works of the United States Government, and statements made by persons other than Mr. Ford which are not protected by copyright.

Although the *Time* agreement was aborted after publication of *The Nation* article, it is important to recall that *Time* initially sought simply to move forward the date of its serialization. Petitioner Harper & Row refused, and it was this refusal which caused *Time* to cancel serialization. It is also reasonable to conclude that *Time*'s ultimate objection to serialization was to the premature disclosure of the *facts* relating to the Nixon pardon. If such facts had been disclosed by *The Nation* without also including any verbatim text at all from the Ford manuscript, there is no reason to conclude that *Time*'s decision to abort would have been otherwise. Thus the "use" of 300 words of protectable material from the Ford manuscript should not be viewed as having more than a *de minimus* impact upon the value of the copyrighted work. There is no more reason to conclude that the use of unprotected facts relating to the resignation and pardon should be the basis for liability by *The Nation* than there would be to hold *Newsweek* magazine liable to

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[53] *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980); *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968).

Time because an exclusive news story published by *Newsweek* has an adverse impact upon the potential market for or value of *Time*.

E. Fair Use Should Be Found To Avoid First Amendment Questions

The case for finding a fair use for the 300 copyrightable words from the Ford manuscript is compelling. But even if it were a close question, this Court should hold the use fair to avoid reaching a constitutional question. The 300 copyrightable words arguably present a situation where ideas and expression are inextricably intermingled and where, therefore, the First Amendment interest should be held to outweigh the copyright interest.[54]

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[54] An example of such a case is *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D.N.Y. 1968) in which the defendant reproduced frames from the Zapruder home movie films of the John Kennedy assassination without permission from the copyright owner. Although the court invoked the doctrine of fair use rather than the First Amendment in holding for defendant, the case has since been viewed as an example of a First Amendment privilege to copy expression where the idea cannot adequately be conveyed without reproducing the expression in which it was contained. See *Iowa State University Research Foundation, Inc.* v. *American Broadcasting Cos.*, 621 F.2d 57 (2d Cir. 1980); *Pacific and Southern Co.* v. *Duncan*, 572 F. Supp. 1186, 1193, n.5 (N.D. Ga. 1983). Other courts have suggested a possible receptivity to this doctrine in limited circumstances, although none has yet invoked it because the facts in each such case did not appear to involve the inextricable intermingling of idea and expression. See *Sid & Marty Krofft Television Prods., Inc.* v *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *Roy Export Co. Establishment* v. *Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095 (2d Cir. 1982); *Encyclopedia Britannica Educational Corp.* v. *Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982); *Pacific and Southern Co., Inc.* v. *Duncan*, 1982 Copyright Rep. (CCH) § 25,421 (N.D. Ga. 1982). Cf. *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1182 (5th Cir. 1980) (Brown, J., concurring).

The present case may well present an example of such inextricable intermingling. Since the book was in fact written by Mr. Ford, significant ideas conveyed were Mr. Ford's own views as to the incidents discussed. The "idea" of Mr. Ford's views as to his own conduct is in part wedded to what he has to say about such conduct, i.e., his "expression." This is not to say that in order to convey that kind of an idea it is necessary to quote verbatim the entire Ford text. It is to suggest that without some quotations of Mr. Ford's precise words, the "idea" of his mental processes in connection with a given incident cannot adequately be conveyed. Arguably, the verbatim use by *The Nation* of 300 of Mr. Ford's words is protected by the First Amendment when idea and expression are so intermingled.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that the judgment of the United States Court of Appeals for the Second Circuit be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—v.—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether, in an action brought under the Copyright Act concerning a news article published in a magazine about a book written by former President Gerald R. Ford that contained information about Mr. Ford's pardon of former President Richard M. Nixon and about other matters of state, the United States Court of Appeals for the Second Circuit was correct:

(a) in refusing to extend copyright protection to facts and other uncopyrightable materials;

(b) in holding that consideration of the four fair use factors set forth in the Copyright Act led to the conclusion that the magazine's minimal use of expression was fair; and

(c) in giving consideration in its ruling to interests grounded in principles of freedom of expression?

Parties Below

The parties to the proceedings below are those listed in the caption.*

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* Pursuant to Supreme Court Rule 28.1, we advise the Court that Nation Enterprises and The Nation Associates, Inc. ("The Nation") have no parent companies and no subsidiaries. The Nation Institute is an affiliate company of The Nation Associates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1632

HARPER & ROW, PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

—v.—

NATION ENTERPRISES and THE NATION ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

In the spring of 1979, Harper & Row, Publishers, Inc. and The Reader's Digest Association, Inc. (hereinafter referred to as "Harper & Row") jointly published *A Time to Heal: The Autobiography of Gerald R. Ford*. (Ct. App. Op. A-5; R. Vol. I, TR A229, 238)[1] The book, as Harper & Row conceived it,

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1 The following abbreviations will be used in this brief: "JA ____" for citation to the Joint Appendix; "Ct. App. Op. ____" for citation to the opinion of the United States Court of Appeals for the Second Circuit (located in the Appendix to the Petition for a Writ of Certiorari); "Dist. Ct. Op. ____" for citation to the opinion of the United States District Court for the Southern District of New York (located in the Appendix to the Petition); "Pet. App." for citations to documents other than the court opinions located in the Appendix to the Petition; "R. Vol. ____, ____" for citation to the Joint Appendix before the

(*Footnote continued on following page*)

was to contain "significant hitherto unpublished material about (1) Mr. Ford's relationship with former President Nixon, [and] (2) the circumstances and reasoning surrounding the pardon of Mr. Nixon by Mr. Ford." (Ct. App. Op. A-5; JA 485-86) In its publicity materials, Harper & Row emphasized the political and factual nature of the book:

> What really happened behind the scenes? What nerve-wracking, challenging meetings were there with White House aides, the Congress, the press, his own family? Gerald Ford answers these questions fully, openly and fairly. From General Alexander Haig's first telephone call to the oath-taking ceremony eight days later, a cascade of events, many of them revelations, rush across the pages of Mr. Ford's book.

(JA 538-539) To protect against uncompensated disclosure of such information, Harper & Row's contract with former President Ford provided that he would not reveal prior to publication "the unique information not previously disclosed" about his career that he planned to disclose in his book. (Ct. App. Op. A-5; JA 484) Mr. Ford testified that he consequently refused to discuss publicly certain aspects of his pardon of former President Richard M. Nixon. (Ct. App. Op. A-5; JA 500-05, 526-29)[2]

(*Footnote continued from preceding page*)

Court of Appeals; and "Pet. Br." for citation to the Brief for Petitioners.

2 Former President Ford's testimony was:

> Q Do you have any personal recollection as to reaching a decision based on [your lawyer's] advice not to appear on television to discuss the pardon prior to publication of the book?
>
> • • •
>
> A The fact that I did not is the best evidence that I made such a decision.
>
> Q And it is a fact that you did not appear—
>
> A Not to discuss the pardon beyond the testimony of what I had previously given to the House Committee.
>
> Q That was because of your agreement with Harper & Row?
>
> A Correct.

(JA 502-03)

On March 14, 1979, Harper & Row sold first serial rights—the exclusive right to publish excerpts from the book prior to the book's publication—to *Time* magazine. (Ct. App. Op. A-5; R. Vol. IV, PTX 9 E565) *Time*'s license entitled it to publish in its April 23, 1979 issue approximately 7,500 words from Chapters One and Three of *A Time to Heal*; for that right *Time* agreed to pay Harper & Row $12,500 on signing the contract and $12,500 on April 16, 1979, the date *Time*'s April 23rd issue would be on sale. (Ct. App. Op. A-5 to A-6; R. Vol. IV, PTX 9 E565-66) In the event that material from the two chapters was published in some other medium prior to *Time*'s use, the contract authorized a renegotiation of the amount of the second payment. (R. Vol. IV, PTX 9 E566)

The Nation Article

Late in March, 1979, a copy of the 655-page, 200,000-word manuscript of *A Time to Heal* was provided to Victor Navasky, editor of The Nation. (Ct. App. Op. A-6; JA 274-75) It is undisputed that the manuscript was not sought; it was not paid for; indeed, The Nation had had no prior connection of any sort with the book. (Ct. App. Op. A-6; JA 274-75) It is also undisputed that Mr. Navasky had no knowledge at the time he received the manuscript of any serialization plans for the book (JA 316c) and no knowledge at the time The Nation's article was published of what excerpts *Time* anticipated publishing. (*Id.*)

The Nation published its 2,250-word article, entitled "The Ford Memoirs: Behind the Nixon Pardon," in its April 7, 1979 issue. (Ct. App. Op. A-6; R. Vol. IV, PTX 10 E569) Mr. Navasky had consulted with The Nation's counsel before publication and had been given a "green light" to publish under the fair use provisions of the Copyright Act. (Ct. App. Op. A-6; JA 317-20)

As its title suggests, The Nation's article centered about Mr. Ford's pardon of former President Nixon. Some of the information included in the article about the pardon had never before been revealed;[3] other information had previously been set forth by President Ford before a congressional committee. (R. Vol. V, DTX B E1224) Mr. Navasky testified that he organized the article to raise the implicit question whether there had been an impropriety or possible obstruction of justice, and that he wrote the article in such a way that the facts might speak for themselves. (JA 295-98)

Published at a time when both President Ford and General Alexander Haig, the individuals in addition to Mr. Nixon most

3 Mr. Ford testified as follows:

> Q As you sit here today, President Ford, do you believe that your belief at the time you spoke in Jackson, Mississippi, that had you said anything other than what you said then, "the whole house of cards might have collapsed," [Ct. App. Op. A-33] is a matter of public interest?
>
> A I think you have to relate that statement by myself which was quoted to the situation as it existed on August 1, 1974. Prior to that time I had been told, and I believed, that Mr. Nixon did not know of the Watergate prior to its being carried out. I had been told the morning of or during the day of August 1 that there might be some additional evidence, but I had not heard it myself. It was a very tense time in our history, and for me to publicly make statements based on this allegedly new information would potentially have created an additional crisis.
>
> And since I had not personally heard the so-called "new evidence," I did not feel that I would be acting properly to make any statement at that time different from what I had been saying previously.
>
> Q Had you told the American public at any point prior to the publication of your manuscript what you have just told us now?
>
> A Repeat that again.
>
> Q Had you told the American public, in any form, prior to the time your manuscript was published of the information that you have just told us in the last three or four sentences of your last answer?
>
> A No.

(JA 526-28; *see also* JA 465-70)

discussed in the article, were considered serious candidates for the 1980 Republican presidential nomination, the article related in its entirety to Mr. Ford's official conduct while in office. (JA 160-61, 281-89; *see* Ct. App. Op. A-31 to A-38) In addition to reporting on the pardon of Mr. Nixon, the article also reported on other newsworthy information in the book not relating to the pardon; none of that information (including, *inter alia*, information about President Ford's retention of Henry Kissinger as Secretary of State and Mr. Ford's consideration of Ronald Reagan as his 1976 running mate) had been revealed to the public before. (JA 465-70) Of the approximately eighty "word portraits" of world leaders written by President Ford, only a few words of one—a description of President Nixon—were included in The Nation article. (R. Vol. I, TR A202-03, A213-15)

On April 3, 1979, *Time* magazine's managing editor read The Nation article and called Harper & Row to request that *Time* be permitted to publish its excerpts from President Ford's book one week earlier than the date provided for in the contract. (Ct. App. Op. A-8; R. Vol. I, TR A231-34) Harper & Row refused *Time*'s request to publish one week early (Ct. App. Op. A-8; R. Vol. IV, PTX 31b, E827), thus causing *Time* not to print the excerpts from *A Time to Heal* and not to make the second $12,500 payment. (R. Vol. I, TR A245; R. Vol. IV, PTX 31b E827)

The District Court's Decision

Following publication of The Nation article, Harper & Row filed this copyright infringement action for the $12,500 they had not received from *Time*.[4] President Ford did not participate as a party to the action. (R. Vol. I, A27)

4 Common law causes of action were asserted initially but are no longer in the case. In a decision prior to trial, the District Court ruled that Harper & Row's common law claims for conversion and interference with advantageous contractual relationships were preempted by the Copyright Act (R. Vol. I, Op. A53), a ruling that Harper & Row unsuccessfully appealed to the Court of Appeals. (JA 5) Harper & Row have not challenged that ruling in this Court. (*See* Petition)

(*Footnote continued on following page*)

At trial, The Nation called Victor Navasky, editor of The Nation and author of the article at issue (R. Vol. I, TR A516, A532) and, as expert witnesses to testify about the newsworthy character of the article and certain of the fair use factors, three journalists: Professor Fred W. Friendly, Edward R. Murrow Professor of Broadcast Journalism at the Columbia University School of Journalism and former president of CBS News, and award-winning authors and journalists Richard Reeves (author of, among other books, *A Ford, Not A Lincoln*) and David Halberstam (author of, among other books, *The Best and the Brightest* and *The Powers That Be*). (JA 58-59, 142-44, 231-35) Harper & Row did not call any expert witnesses and did not cross-examine the three experts. (*See* R. Vol. I, TR 800)

After the non-jury trial, the United States District Court for the Southern District of New York (Owen, J.) held The Nation liable for $12,500 in damages for copyright infringement. Annexed to the brief opinion of the District Court as "The Court's Supplemental Findings of Fact" and "Conclusions of Law" was a xerox copy of Harper & Row's submitted findings of fact and conclusions of law with certain portions inked out by the court and the great bulk adopted *in haec verba* and signed by the court. (Dist. Ct. Op. B-14; *see* R. Vol. I, A878)

As the trial court viewed the case from the start, the question before it was simple: had The Nation demonstrated that its article was "newsworthy enough to justify a breach of the copyright laws"? (JA 94) Only in that situation, the court observed, were "the copyright laws . . . to be disregarded" (JA 96) and copyright violations "forgiven." (R. Vol. I, TR A707) Given that view of the case, the court conducted an inquiry into whether information contained in The Nation article did or did not constitute a "great piece of news." (JA

(*Footnote continued from preceding page*)

Harper & Row also had set forth a common law claim for misappropriation of "hot news," purportedly based on *International News Service* v. *Associated Press*, 248 U.S. 215 (1918). That claim was abandoned by Harper & Row by amendment to their complaint. (Ct. App. Op. A-9 n.2; *compare* R. Vol. I, Compl. A7 *with id.* A34)

209) Concluding that the information did not, the court held that the "revelations of the Ford memoirs were not such news, 'hot' or otherwise, as to permit the use of author Ford's copyrighted material." (Dist. Ct. Op. B-8)

Only after having rejected The Nation's fair use claims did the District Court address the issue of whether the material that had been "copied" was subject to Harper & Row's copyright. The court agreed that historical fact, memoranda prepared by others, and quotations from persons other than Mr. Ford were not included within Harper & Row's copyright. Nonetheless, the court declined to exclude this material from consideration before engaging in its fair use analysis because the "historical facts, memoranda, and statements [were] integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence." (Dist. Ct. Op. B-11)

The Opinion of the Court of Appeals

In reversing the judgment of the District Court, the United States Court of Appeals for the Second Circuit first assessed how much of the material The Nation had used was, in fact, copyrightable by Harper & Row. The court examined the material according to the principle codified in section 102(b) of the Copyright Act and embodied in case law that facts are not copyrightable, and then satisfied itself that The Nation had not appropriated the structure, arrangement, or mosaic of the book or any significant part of it. Having done that, the Court of Appeals held that to the extent The Nation article had reported facts, it had not infringed any copyright owned by Harper & Row. (Ct. App. Op. A-14 to A-16) The court also held that former President Ford's testimony before a congressional committee, which he had incorporated into the book, was a work of the United States Government and not subject to copyright. (Ct. App. Op. A-22) The court declined to hold, however, that President Ford's oral conversations about official matters while he was in office constituted a work of the United States Government. (Ct. App. Op. A-23) Finally, the

court excluded from material subject to Harper & Row's copyright conversations or written material that did not originate with former President Ford. (Ct. App. Op. A-22 to A-23)

Having determined that The Nation had used approximately 300 words of copyrightable expression, the Court of Appeals turned to the question of fair use. The court held clearly erroneous the District Court's conclusion "that 'the piece was not such news, "hot" or otherwise, as to permit the use.' " (Ct. App. Op. A-25)[5] The Court of Appeals rejected the District Court's legal standards for evaluating the four fair use factors. It concluded that the use had been for the purpose of news reporting, that the nature of the book was factual and political, that the expression copied was no more than was necessary for that purpose, and that any possible economic harm had been caused by the use of facts and not of expression. The Nation's use of small and scattered amounts of copyrighted expression was held to be fair. (Ct. App. Op. A-25 to A-29)

SUMMARY OF ARGUMENT

There are striking omissions in Harper & Row's presentation of their case to this Court. Absent from their brief is virtually any reference to two of the most elemental principles of copyright law. One is the dichotomy long established in law between what the copyright law protects—expression—and what it does not protect—information. There is, as well, only a glancing reference to the four factors set forth by Congress to determine if a use of expression is or is not fair. And there is barely a nod by Harper & Row to First Amendment principles beyond condemning the Court of Appeals for having considered them.

By virtually ignoring these matters, Harper & Row have all but ignored what this case is about. As we demonstrate in Part I of this brief, the Court of Appeals correctly determined that

5 Judge Meskill, who dissented, agreed that "the holding below that the *Nation* article was not news was clearly erroneous." (Ct. App. Op. A-45)

The Nation in its 2,500-word article about a 200,000-word book, a book written by the most powerful man in the nation about his presidency, did not appropriate the structure or mosaic of the book, let alone what the District Court referred to as its "totality." The court's conclusion that most of the material The Nation used was uncopyrightable fact or otherwise not subject to copyright protection is consistent with deeply rooted copyright law. Such material was, in a phrase Professor Latman used years ago, subject to "unlimited use" by anyone.

The Court of Appeals turned then to the issue of fair use. In Part II of this brief, we demonstrate that the court's treatment of each of the four fair use factors set forth by Congress was consistent not only with rulings as recent as *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), but with long-established precedent. The Nation quoted about 300 words of copyrightable material from the Ford memoirs. Based on the undisputed testimony and its examination of both the book and The Nation article, the court correctly concluded that the purpose of The Nation's use was news reporting; the nature of the book was factual and political; the quotations in the article were "informative and neither superfluous or excessive for the article's purpose"; and that economic harm, if any, had been caused by The Nation's reporting of facts about the Nixon pardon and not by any act for which the Copyright Act permits recovery. That being so, the Court of Appeals rightly concluded that the use by The Nation of a "meager, indeed an infinitesimal amount" of President Ford's language constituted a fair use under governing law.

Much of Harper & Row's criticism of the Court of Appeals' opinion stems from the court's references to the First Amendment. In Part III of this brief, we demonstrate that the decision was consistent with both the Copyright Act and the First Amendment. Both the idea-expression dichotomy and the fair use doctrine serve the function of avoiding conflict between First Amendment precepts and those of the Copyright Act. In contrast, Harper & Row's grudging view of both

principles of copyright law would, if adopted, create continual conflict with the First Amendment itself. By interpreting copyright law consistently with its history, the Court of Appeals acted in accord not only with copyright principles but with those of freedom of expression.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY DETERMINED THAT MUCH OF WHAT THE NATION ALLEGEDLY COPIED WAS NOT SUBJECT TO HARPER & ROW'S COPYRIGHT

In analyzing the nature of copyrightability and in applying the fact-expression distinction, the Court of Appeals properly applied long-established principles of copyright law. None of the court's theories was novel; none conflicts with traditional copyright holdings. Commencing with the very methodology of the Court of Appeal's opinion, the opinion is consistent with the development of nearly two hundred years of copyright law and with the policies that underlie that law.

The District Court had first considered the question of whether The Nation article was "news reporting" and whether such reporting constituted fair use. (Dist. Ct. Op. B-9) The Court of Appeals rejected that analysis, considering first the threshold question of whether and to what extent material used by The Nation was even copyrightable by Harper & Row. (Ct. App. Op. A-14) By addressing that question first, the Court of Appeals engaged in the analysis mandated by the Copyright Act.

Professor Latman, in the study that formed the basis for Congress' debate on the inclusion of the fair use doctrine in the 1976 Act, restated the principle:

> [A] broad underlying premise for the doctrine of fair use is supplied by the notions that: (1) the user has unlimited use of a great deal of unprotected material embodied in a copyrighted work; and (2) the user may, under any circumstances, copy an insignificant portion of protected material.

Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on Judiciary, 86th Cong., 2d Sess., Copyright Law Revision Study No. 14, 7 (Comm. Print 1960) (Latman, *Fair Use of Copyrighted Works*).[6]

Courts have analyzed works in this fashion for decades. In *American Code Co.* v. *Bensinger*, 282 F. 829 (2d Cir. 1922), for instance, the court wrote:

> If one takes matter which lies in the public domain, or which has been dedicated to the public by publication without securing copyright under the acts of Congress, and, adding thereto materials which are the result of his own efforts, publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work.

Id. at 834. *Accord Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp.

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6 The original report by the Register of Copyrights prepared in 1961 for Congress similarly states:

> Copyright does not preclude anyone from using the ideas or information disclosed in a copyrighted work. Beyond that, the work itself is subject to fair use.

H.R. Comm. on Judiciary, 87th Cong., 1st Sess., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 24 (Comm. Print 1961).

788 (S.D.N.Y. 1971); *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Hirsch* v. *Paramount Pictures, Inc.*, 17 F. Supp. 816 (S.D. Cal. 1937).

In those cases, as in this, the courts were following precisely what Professor Ball defined as the law in 1944:

> In a suit for copyright infringement, the court directs its inquiry to a determination of: (1) What was appropriated by the defendant from the plaintiff; (2) if anything was appropriated, whether such appropriation was of copyrightable matter; and, if so, (3) whether it was substantial and material appropriation.

H. Ball, *The Law of Copyright and Literary Property* 343 (1944). As we next demonstrate, the Court of Appeals correctly decided each of these issues.

A. The Court Of Appeals Correctly Determined That The Nation's Use Of Fact And Not Expression Did Not Infringe Any Copyright Held By Harper & Row

1. The Origin of the Distinction Between Fact and Expression

At the heart of the Court of Appeals' analysis is a proposition of law so long established that its explicit inclusion in the Copyright Act of 1976 only confirmed what had long been recognized: the copyright laws protect only expression. Ideas and facts are not copyrightable.

Section 102(b) of the Act states:

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Section 102(b) reflects Congress' view that "[c]opyright does not preclude others from using the ideas or information revealed by the author's work," and Congress' recognition of "the basic dichotomy between expression and idea" and of the uncopyrightability of ideas, facts, and information. S. Rep. No. 983, 93d Cong., 2d Sess. 107-08 (1974); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 56-57 (1976).[7]

The idea-expression distinction is rooted in early English and American cases in which the courts attempted to forge an acceptable test for copyright infringement when the defendant had used only part of a copyrighted work.[8] The distinction was first expressed in *Millar* v. *Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769), in which Justice Yates wrote:

> Property is founded on occupancy.
>
> But how is possession to be taken, or any act of occupancy asserted, on mere intellectual ideas? . . .
>
> * * *
>
> [W]hat distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no earmarks upon them.

4 Burr. at 2357, 2366, 98 Eng. Rep. at 230, 235. The answer was that the particular order of words, the expression, could

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7 The distinction was noted in 1961 by the Register of Copyrights in his initial report to Congress on the revision of the copyright law:

> Copyright does not preclude others from using the ideas or information revealed by the author's work. . . . [A]nyone is free to create his own expression of the same concepts or to make practical use of them, as long as he does not copy the author's form of expression.

Report of the Register of Copyrights, *supra*, at 3.

8 The problem did not arise with any frequency for many decades after the first copyright statute was enacted in England in 1709, 8 Anne c. 19 (1710), primarily because many uses protected today were not protected then. During the eighteenth and most of the nineteenth centuries, anyone could translate a work with impunity, dramatize a novel, or, for the most part, publish an abridgement of another's work. B. Kaplan, *An Unhurried View of Copyright* 9-12, 28-32 (1967). In the early years of this nation, newspapers and magazines, moreover, copied freely from one another. 1 F.L. Mott, *A History of American Magazines* 39 (1957).

serve as the "earmarks" of intellectual property. The distinction grew into doctrine. *See, e.g., Goldstein* v. *California*, 412 U.S. 546, 571 (1973) (no restraint placed by state "on the use of an idea or concept"); *Mazer* v. *Stein*, 347 U.S. 201, 217 (1954) ("[u]nlike a patent, a copyright gives no exclusive right to the act disclosed; protection is only given to the expression of the idea—not the idea itself") (footnote omitted); *International News Service* v. *Associated Press*, 248 U.S. 215, 254 (1918) ("the element in intellectual productions which secures such protection is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed"); *Holmes* v. *Hurst*, 174 U.S. 82, 86 (1899) ("[t]he right is to that arrangement of words which the author has selected to express his ideas"); *Baker* v. *Selden*, 101 U.S. 99, 102-03 (1879); *Nichols* v. *Universal Pictures Corp.*, 34 F.2d 145, 147-48 (S.D.N.Y. 1929), *aff'd*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Story* v. *Holcombe*, 4 McLean 306, 316, 23 F. Cas. 171 (C.C.D. Ohio 1847) (No. 13497).

The idea-expression distinction was extended early on to facts and information as well as to ideas. In *Matthewson* v. *Stockdale*, 12 Ves. Jun. 270, 275, 33 Eng. Rep. 103, 105 (Ch. 1806), Lord Erskine wrote: "no man can monopolize such subjects as the English Channel, the Island of St. Domingo, or the events of the world." The distinction was extended specifically to historical and biographical information. *Lake* v. *Columbia Broadcasting System, Inc.*, 140 F. Supp. 707, 708-09 (S.D. Cal. 1935), adjudicated a claimed infringement of a biography of Wyatt Earp. The court wrote: "[h]istorical facts and events in themselves are in the public domain and are not entitled to copyright protection." *Accord Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) ("while the mode of expression employed by [the first author] is entitled to copyright protection, he could not acquire by copyright a monopoly in the narration of historical events"); *Musto* v. *Meyer*, 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd mem.*, 598 F.2d

609 (2d Cir. 1979) (article about Sigmund Freud and Sherlock Holmes held not infringed by motion picture); *Gardner* v. *Nizer*, 391 F. Supp. 910 (S.D.N.Y. 1975) (any facts copied from biography of Julius and Ethel Rosenberg were uncopyrightable); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971) (no copyrightability in facts contained in writings about Ezra Pound); *Greenbie* v. *Noble*, 151 F. Supp. 45, 66-67 (S.D.N.Y. 1957) (" '[i]t is pure superarrogation for one to suggest that he has any proprietary interest in an era of history.' . . . The second author may also adopt the first author's historical ideas and theories since the law of copyright only protects an author's mode of expression and not his ideas"); *Echevarria* v. *Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S.D. Cal. 1935) (no copyright existed in historical incidents).

The rationale for the distinction and the decisions is clear. To allow anyone to copyright facts, information, or news would contravene the very purpose of the copyright clause of the United States Constitution, *viz.*, "to promote the progress of science and the useful arts." U.S. Const. art. I, § 8, cl. 8. It would permit, as Professor Nimmer observed in a passage quoted by the Court of Appeals, a newspaper to own the facts about Watergate. (Ct. App. Op. A-19 n.12) *See* 1 M. Nimmer, *Nimmer on Copyright* § 2.11[E] at 2-169 (1984). To allow ownership of facts and information would contravene the purpose of the copyright laws while simultaneously conflicting with the First Amendment.[9]

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9 The legal theory buttressing the policy is basic. Section 102(a) of the Act states that copyright protection extends only to "original acts of authorship." Professor Nimmer explains:

> Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an "author" in either the constitutional or statutory sense.

1 M. Nimmer, *Nimmer on Copyright* § 2.11[A] at 2-158 (1984) (footnotes omitted). *See also* R. Gorman, *Fact or Fancy? The Implication for Copy.*, 29 J. Copyr. Soc. 560, 571 (1983).

2. Application of the Distinction Between Fact and Expression to this Case

The Court of Appeals applied this maxim and ruled that no copyright attached to the facts Mr. Ford had recorded. The court therefore found that those parts of The Nation article that did not contain Mr. Ford's expression did not infringe his copyright.[10]

Examining a passage from the article illustrates how the principle applies to this case. Harper & Row claim that a sentence in The Nation article was "copied" from a paragraph in the manuscript. (Pet. App. at E-3) Comparing the manuscript with the article, however, reveals that the only material "copied" was fact.

The manuscript reads:

> About a month before the convention, my aides had met with Reagan's representatives to discuss the need for party unity. And they had reached an agreement. At the end of the Presidential balloting, the winner would go to the loser's hotel suite and congratulate his opponent for waging a fine campaign. Together, they would appear at a press conference and urge all Republicans to put aside their differences and rally behind the ticket. That was the only way we could leave Kansas City with a hope of victory. When it appeared that I was going to win, Sears contacted Cheney and refined the scenario. He insisted on two conditions. The first was that I had to see Reagan alone; there could be no aides from either camp in the room. Secondly, under no circumstances should I offer him the nomination to be Vice President. Reagan had said all along that he wasn't interested in the job. He had meant what he said. If I tried to talk him out of it, he would have to turn me down, and that would be em-

10 Included in the Joint Appendix is a sentence by sentence analysis of the article illustrating why much of the article cannot be said to constitute a taking of expression or to infringe any copyright held by Harper & Row. (JA 557-625)

> barrassing because it would appear that he was refusing to help the GOP. When Cheney relayed those conditions to me, I agreed to go along with them. I would need Reagan's assistance in the fall campaign. It would be stupid to anger him or his followers at this moment.
>
> Later I was told that just before my arrival at the Californian's hotel, one of his closest advisers, businessman Justin Dart, had urged him to say yes if I asked him to be my running mate. Regardless of anything he'd said before, Dart had insisted, it was his patriotic duty to accept the number two post. Finally, according to Dart, Reagan had agreed. But at the time, no one mentioned this new development to me. Had I been aware of the Dart-Reagan conversation, would I have chosen him? I can't say for sure—I thought his challenge had been divisive, and that it would probably hurt the party in the fall campaign; additionally, I resented some of the things that he'd been saying about me and my Administration's policies—but I certainly would have considered him.

(JA 628-29)

The Nation article reads:

> Ford also writes that, but for a misunderstanding, he might have selected Ronald Reagan as his 1976 running mate.

(JA 627)[11] This and other similarly structured portions of the article use facts and not expression. *See Hoehling* v. *Universal*

11 In Plaintiffs' Exhibit 11 (Pet. App. at E-4 to E-41), Harper & Row characterized, both by their selection of manuscript pages and by their yellow markings, an unreasonably small portion of the manuscript as the source of the information for The Nation article. A fair reading of the manuscript reveals that the *information* contained in The Nation's statements can be gleaned only by referring to far larger portions of the manuscript than are reproduced in Plaintiffs' Exhibit 11. By reading the paragraph from the manuscript quoted in Plaintiffs' Exhibit 11 as the source of the article's statement about Mr. Reagan, for example, it is impossible to tell that there had been a "misunder-

(*Footnote continued on following page*)

City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

Harper & Row's various criticisms of this portion of the Court of Appeals' opinion have a common theme: all seek to avoid a body of law that purposefully sanctions reporting on facts and ideas in any copyrighted work. Harper & Row claim, for example, that the Court of Appeals excluded from its consideration critical elements of authorship other than expression—the selection and arrangement of facts. (*See* Pet. Br. at 15-21) The court did nothing of the sort. It ruled that:

> There are, however, several general principles according to which the boundary between fact and expression may be mapped for works in which much factual material is described. An author's originality exists, in part, in his overall arrangement of facts. The structure he chooses for the work as a whole is important. *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, *supra*, 558 F.2d at 94, and *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974). *In this case there can be no concern that this mode of expression was usurped; the* Nation *article drew only upon scattered parts and not the total entity with its unique and protected mosaic.*

(Ct. App. Op. A-16; emphasis added) The court emphasized this point again when it stated:

> Here, *The Nation* drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words. This is precisely the situation to which Nimmer refers in his treatise when he writes:

(*Footnote continued from preceding page*)

standing" between Mr. Ford and Mr. Reagan. A reader must read the preceding paragraph in the manuscript to discern that fact, because the "misunderstanding" derived from the change in the ground rules for the Ford-Reagan interview and from Mr. Ford's ignorance of the change. A comparison of relevant passages in the manuscript and the article is set forth at JA 627-704.

> "What if the defendant has copied neither the plaintiff's word for word form of expression, nor the selection and arrangement of plaintiff's facts, but has nevertheless copied one or more facts which appear in plaintiff's factual work? Here the answer on principle should be that plaintiff cannot establish copyright infringement." 1 *Nimmer on Copyright* § 2.11[E] at 2-164 (1983).

(Ct. App. Op. A-18)

The correctness of this holding is graphically illustrated by Plaintiffs' Trial Exhibit 11 (Pet. App. E-1 to E-41), in which Harper & Row list the pages in the manuscript that they claim correspond to consecutive sections of the article. The page citations to the manuscript are as follows: 607-08, 401, 44, 496, 1, 2-3, 4, 8, 7, 4-5, 5, 5-6, 8, 14, 15, 16, 16, 18, 19, 21, 266, 236, 246, 248, 249, 238-39, 239, 243, 245, 246, 250, 250-51, 251, 252, 253, 254, 256, 298, 299, 46, 494, 537, 155-56, 216, 415, 416, 416, 53-54, 57. A 2,250-word news article that Harper & Row claim is "copied" from such scattered pages in a 200,000-word manuscript hardly can be said to usurp any structure or mosaic.

Turning next to the issue of paraphrase, the Court of Appeals concluded that "paraphrasings of disparate facts such as those found in this case" could not constitute infringement. (Ct. App. Op. A-16 to A-17; *see* Pet. Br. at 21-23) The court (using the word "paraphrase" to mean the use of fact and not of expression) then distinguished cases in which virtually an entire work had been appropriated,[12] commenting:

> [I]f *The Nation* had taken, for example, . . . all of a chapter and merely changed the language here and there,

12 An example of such appropriation, referred to by the Court of Appeals, is *Meredith Corp.* v. *Harper & Row, Publishers, Inc.*, 378 F. Supp. 686 (S.D.N.Y.), *aff'd per curiam*, 500 F.2d 1221 (2d Cir. 1974). (Ct. App. Op. A-16) The second book in *Meredith* was effectively a duplicate of the first, which had served as the model for "topics to be included, weighting of topics, and sequencing of topics." 387 F. Supp. at 687.

paraphrasing would not and should not suffice to protect it.

(Ct. App. Op. A-17 to A-18)

The court's conclusion is in full accord with copyright precedent. Cases that have invoked the word "paraphrase" to justify a finding of infringement are ones in which much or most of the work has been copied[13] or in which the material paraphrased has been virtually void of protectible expression.[14] "Paraphrase" has never been sufficient for infringement in a case such as this.

The reason for that is plain: to hold The Nation liable because it paraphrased facts when it summarized President Ford's discussion of his decision to pardon Mr. Nixon is effectively to preclude any such reporting. To rule, as the Court of Appeals observed, that it is impermissible copying to paraphrase discrete facts is to do precisely what the copyright law forbids: to permit copyright protection of information itself. (Ct. App. Op. A-18)

Nor do cases involving possible infringement of *compilations* of fact—*e.g.*, catalogues of baseball cards, telephone directories, and the like—contradict this aspect of the Court of Appeals' opinion. (Pet. Br. at 16-21) Compilations are works on the fringes of copyright, *e.g.*, directories that consist largely of uncopyrightable facts, anthologies made up of works in the

13 *See Nutt* v. *National Institute Inc.*, 31 F.2d 236, 238 (2d Cir. 1929) (virtually entire lecture replicated with only a "colorable variation"); *Orgel* v. *Clark Boardman Co.*, 301 F.2d 119, 120 (2d Cir.), *cert. denied*, 371 U.S. 817 (1962) (defendant had done "little more than edit" plaintiff's work); *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) (expression had been appropriated and the defendants had repeatedly "passed off" the plaintiff's product as their own). (*See* Pet. Br. at 15-18)

14 *See Flick-Reedy Corp.* v. *Hydro-Line Mfg. Co.*, 241 F. Supp. 127 (N.D. Ill. 1964), *aff'd in part*, 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966) (mathematical data or formulae); *Wagner* v. *Meccano, Ltd.*, 246 F. 603 (6th Cir. 1917) (instruction manual for machinery). (*See* Pet. Br. at 21-22)

public domain, law books that include uncopyrightable excerpts of cases. In such works, the only original and protectible element is the arrangement and/or the selection of material. In these cases, infringement consists in copying the selection or arrangement—precisely what did not occur here.

As the court in *Miller* v. *Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981), put it:

> It is difficult to adequately distinguish some of the directory cases, and particularly the language of the opinions. . . . A copyright in a directory, however, is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. . . .
>
> In any event, it may be better to recognize the directory cases as being in a category by themselves rather than to attempt to bring their results and rationale to bear on nondirectory cases.

Id. at 1369-70 (citations omitted).[15] *See* R. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1570 (1963).

15 *Miller* and other cases cited by Harper & Row support The Nation's position. In *Miller*, the court overruled the district court on the ground that it had instructed the jury that research was copyrightable, noting that the copyright law was not intended "to reward . . . the efforts involved in discovering and exposing facts." *Id.* at 1369. In *Eisenschiml* v. *Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957), the court, noting that "[i]deas as such are not protected by the law of copyright," found that despite numerous examples of close paraphrasing by the defendant magazine writer there had not been infringement of the plaintiff's book. In *Holdredge* v. *Knight Publishing Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963), the court based its holding on the defendant's copying of the "manner and style in which the plaintiff chose to set down the factual and historical material she used, and to express her thoughts and conclusions." Still other cases cited by Harper & Row stand simply for the proposition that expression is protected and information is not. *See, e.g., Chicago Record-Herald Co.* v. *Tribune Ass'n*, 275 F. 797, 799 (7th Cir. 1921); *Amana Refrigeration, Inc.* v. *Consumers Union of the United States, Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1977). (*See* Pet. Br. at 16-17)

Harper & Row repeatedly accuse the Court of Appeals of erroneously holding that "facts coupled with expression cannot constitute a copyrightable totality." (Pet. Br. at 12, 18-21) To the contrary, as set forth above, the Court of Appeals assured itself that the "totality" of the book—*i.e.*, its structure or mosaic—had not been taken before concluding that the reporting of facts did not invade the book's copyright.

Harper & Row's "totality" is of a different sort. The District Court put it this way:

> [I]t is the totality of these [uncopyrightable] facts and memoranda collected together with Ford's reflections that made them of value to The Nation. Correspondingly, it is this same totality that is protected by the copyright laws.

(Dist. Ct. Op. B-10 to B-11)[16] Reduced to its essence, this articulation would permit a copyright holder to own a vast amount of uncopyrighted and uncopyrightable material in the service of protecting the "totality" of a work. This would be so even when the structure of the book was not taken, so long as one *uncopyrightable* fact of major importance was reported. To so hold would be to conclude that, in copyrighting his book, Mr. Ford and through him Harper & Row gained a monopoly on the facts of the Nixon pardon—precisely what the fact-expression distinction seeks to avoid.[17]

At its core, Harper & Row's argument is directed less at the Court of Appeals' ruling than at the fact-expression distinction

16 Harper & Row inaccurately characterize this passage as a "finding" that is "unchallenged." (Pet. Br. at 18) This passage formed part of the District Court's opinion that The Nation not only challenged in the Court of Appeals, but that the Court of Appeals reversed as legally insupportable. The same may be said of other "findings" that Harper & Row describe as "unchallenged." (Pet. Br. at 23, 24, 36, 41)

17 For example, The Nation article quoted a memorandum written by a Watergate prosecutor detailing Mr. Nixon's possible areas of criminal liability. (Ct. App. Op. A-33 to A-34) Mr. Ford included this memorandum in his book as influencing his decision to pardon Mr. Nixon. It was certainly Mr. Ford's consideration of the memorandum that interested The Nation in it. According to the District Court, therefore, both the memorandum and the fact that Mr. Ford considered it became the property of Mr. Ford and could not be reported by The Nation even if no expression at all had been used.

itself. If the "overall arrangement of facts" by Mr. Ford (Ct. App. Op. A-16) had been appropriated by another, nothing in the Court of Appeals' decision would protect the infringer. If too much expression had been quoted, nothing in the court's interpretation of the fair use doctrine would protect the infringer. What the decision of the Court of Appeals permits is what Harper & Row would prohibit: a news article about a forthcoming book on public affairs that does *not* appropriate any such "arrangement" and does *not* quote more expression from the book than the fair use doctrine allows.

It is no answer for Harper & Row to say that they seek no more than to be the "owner" of President Ford's "description" of the pardon. (Pet. Br. at 23) It should be clear that Mr. Ford as a participant in the events he described does not have a greater monopoly on the facts he disclosed than a journalist or an historian would have. But Harper & Row's emphasis on Mr. Ford's "unique perspective" and on "the expressive nature of autobiography" (Pet. Br. at 18) would lead to just that. It is one thing to say that Harper & Row may seek the assistance of the courts in protecting the use of the book's expression or that they may seek to be first to disclose uncopyrightable information learned by President Ford while in office. To contend, however, that the permissible use of such a work is narrower simply because President Ford was, as it were, a first person witness to the events of his presidency turns the copyright law, not to say First Amendment principles, inside out. That President Ford knows facts about what occurred while he was in office—*e.g.*, what statement he read to General Haig about pardoning Mr. Nixon—is hardly a basis for affording him legal protection with respect to the disclosure of that information that the copyright laws grant to no one else.

Harper & Row may seek to be first to disclose uncopyrightable information in a book; nothing in the copyright law precludes news reporting on the information contained in that book.[18]

18 As noted previously, all of Harper & Row's potential common law claims have either been dropped or not pressed in this Court. *See* n.4, *supra*.

B. The Court Of Appeals Correctly Determined That The Nation's Use Of Other Uncopyrightable Material Did Not Infringe Harper & Row's Copyright

The Court of Appeals also held that certain quotations from the book did not infringe any copyright held by Harper & Row.[19] Both the Court of Appeals and the District Court agreed that "work[s] of the United States Government" are not copyrightable. (Ct. App. Op. A-22; Dist. Ct. Op. B-9 to B-10) *See* 17 U.S.C. § 105 (1982). Such works are defined as those "prepared by an officer or employee of the United States Government." 17 U.S.C. § 101 (1982).

Mr. Ford surely could not acquire or transfer a copyright in the memorandum quoted in the article that had been written by prosecutor Henry Ruth about the status of the criminal investigation of Mr. Nixon (Ct. App. Op. A-33 to A-34), for example, because that memorandum had been prepared by a government employee in the course of his duties. Nor can it be questioned that the written statement President Ford read over the telephone to General Haig, which is quoted in the article (Ct. App. Op. A-33), is an uncopyrightable work of the United States Government.

Similarly, material that was both a government work and previously placed in the public domain by former President Ford cannot now form the basis of an infringement suit. In President Ford's testimony before the Subcommittee on Criminal Justice, Committee on the Judiciary of the House of Representatives, he revealed information and used expression that he later re-used, virtually verbatim, in his manuscript. (*See* JA 705-17) Mr. Trevor Armbrister, who assisted Mr. Ford in writing the book, testified at the trial that portions of the manuscript allegedly copied by the article were based on the pardon testimony. (R. Vol. I, TR A170-71; R. Vol. V, PTX 43, E1067) The United States Government Printing Office published the pardon testimony without a copyright notice in

19 The Court of Appeals rejected The Nation's argument that oral conversations of President Ford about official business held while in office were works of the United States Government. (Ct. App. Op. at A-19) We do not press that argument in this Court.

1975, well before the manuscript's preparation. *See Pardon of Richard M. Nixon, and Related Matters: Hearings Before Subcomm. on Criminal Justice of House Comm. on Judiciary*, 93d Cong., 2d Sess. at 90-151 (1974) (R. Vol. IV, PTX E1224-56). This publication was more than adequate to inject the testimony into the public domain. *See* 1 M. Nimmer, *Nimmer on Copyright* § 4.04 (1984). Factual material "published and incorporated in official government records for the benefit of the public at large may not be privately appropriated and 'taken from that public under the guise of copyright.' " *Greenbie* v. *Noble*, 151 F. Supp. 45, 66 (S.D.N.Y. 1957). This has been the law for more than sixty years. *American Code Co.* v. *Bensinger*, 282 F. 829, 834 (2d Cir. 1922). *See Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

Finally, material originating with persons other than Mr. Ford is not protected by Harper & Row's copyright. The Constitution's reservation of copyright "to Authors," Art. I, § 8, cl. 8, and the limitation of copyright in the Copyright Act of 1976 to "original works of authorship," 17 U.S.C. § 102(a) (1982), require that material for which copyright is sought be original. Consequently, the courts uniformly have held that if an author quotes another's words, he may not recover for their infringement. *Suid* v. *Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980); *Alexander* v. *Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978); *Norman* v. *Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 798 (S.D.N.Y. 1971); *Rokeach* v. *Avco Embassy Pictures Corp.*, 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978); *Estate of Hemingway* v. *Random House, Inc.*, 23 N.Y.2d 341, 349, 244 N.E.2d 250, 256, 296 N.Y.S.2d 771, 779 (1968).

Both the Court of Appeals' analysis and its conclusion that much of what The Nation reported on in its article is not copyrightable are thus consistent with long-established precedent. A contrary result would put at risk all who refer to facts or information first uncovered by another. That is precisely what the Copyright Act seeks to avoid.

II.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE USE MADE OF THE BOOK WAS FAIR

Having concluded that much of what The Nation reported on in its news article about the Ford book was not copyrightable by Harper & Row, the Court of Appeals then examined the quotation by The Nation of approximately 300 copyrightable words from the book to determine whether The Nation's use of them had been fair. Those quotations, as summarized by the Court of Appeals, are a number of "scattered phrases," the larger part of which is "a short segment of Ford's conversations with Henry Kissinger and several other individuals and Ford's impressionistic depictions of Nixon ill with phlebitis after the resignation and pardon and of Nixon's character." (Ct. App. Op. A-23) The Court of Appeals' conclusion that those quotations of expression constituted fair use was, as we next demonstrate, correct and entirely consistent with governing law.

In section 107 of the Copyright Act of 1976, Congress codified the common law doctrine of fair use.[20] Four factors were specifically identified by Congress. The Second Circuit examined each of them and determined as a matter of law on the undisputed record before it that The Nation's use was fair. We turn next to each of those factors.

20 The doctrine appeared in the law as early as 1802. Lord Ellenborough wrote in *Cary* v. *Kearsley*, 4 Esp. 168, 170 Eng. Rep. 679, 680 (K.B. 1802): "[t]hat part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action." Not until the end of the nineteenth century was it "understood that to publish in an anthology a complete poem without the proprietor's leave is to permit a breach of the law of copyright." A. Birrell, *The Law and History of Copyright in Books* 180 (1899). In the United States, the 1841 case of *Folsom* v. *Marsh*, 2 Story 100, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901), involved the taking of 319 full pages of the letters of George Washington. Notwithstanding the enormity of the appropriation, Justice Story observed that the question of whether such a taking was unprotected was one that was "intricate and embarrassing," calling for "subtile," "refined," and "almost evanescent" distinctions.

A. The Purpose Of The Use

Section 107 of the Act cites news reporting as one purpose lending itself most readily to a finding of fair use. The Court of Appeals unanimously held that The Nation article plainly constituted news reporting and that the District Court's ruling to the contrary was clearly erroneous. (Ct. App. Op. A-25, A-45) Rejecting the District Court's failure to find that the article constituted news reporting because Judge Owen disapproved of "the quality of the journalism," the court held "that the task of courts in 'fair use' analysis should be understood not as deciding what makes bona fide news, but as examining whether a claim of 'news reporting' is false." (Ct. App. Op. A-26)

In all respects, the decision of the Court of Appeals was correct. The District Court had refused to recognize the article as news reporting despite uncontradicted testimony, in addition to that of The Nation's editor, by three nationally recognized experts on news reporting—Fred W. Friendly, David Halberstam, and Richard Reeves—that the article plainly constituted serious and significant news reporting. (JA 72, 210-11, 265) In essence, the District Court merely substituted its own news judgment for those expert in the field that too little in The Nation article was "new" and that the article was an example of "poor journalism." (Dist. Ct. Op. B-8, B-16 to B-17)

Harper & Row now seek to resurrect these rightly rejected concepts when they urge this Court to reverse the Court of Appeals on the ground that The Nation article was a non-productive use that had no public benefit. In arguing that The Nation's use was non-productive (Pet. Br. at 37-38), Harper & Row mistake both the legal standards set forth in this Court's opinion in *Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984), and the proper application of those standards to this case. As this Court well recalls, at issue in *Sony* was whether home videotaping was a productive use. *Id.* at 795 n.40, 807 (opinion of the Court per Stevens, J.; Blackmun, J., dissenting). The discussion in the dissent relied upon by Harper & Row (Pet. Br. at 34) explicitly stated that news reporting was a presumptively productive use:

> The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, scholarship, or research." The House and Senate reports expand on this list somewhat, and other examples may be found in the case law. Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work.

Id. at 807 (footnotes omitted; emphasis in original).

Harper & Row are similarly mistaken when they claim that the use was not productive and thus presumptively not fair because "nothing at all" was added and because "legitimate" news reporting contains "original research." (Pet. Br. at 36) Not only was all the experts' testimony at trial to the contrary (JA 111-13, 210, 264-67), but the very notion that news reporting is not "legitimate" because the news itself might otherwise become publicly available in two or four weeks is simply frivolous. It is understandable that book publishers who sell news would prefer to be the first to do so; it is incomprehensible that the argument should seriously be made that a news article about a former president's forthcoming book may be considered neither "news reporting" nor "legitimate" news reporting.[21] In fact, the Report of the Register, contained in both the House and Senate Reports on section 107, includes the following example of fair use: "summary of an address or article, with brief quotations, in a news report." *Id.* at 807 n. 29.

The nature of the task Harper & Row would impose upon the courts is illustrated by Harper & Row's criticism of The

21 It is noteworthy that the first Pulitzer Prize for Meritorious Public Service was awarded to *The New York Times* in 1918 "for its public service in publishing in full so many official reports, documents and speeches by European Statesmen relating to the progress and conduct of the war." *The Pulitzer Prize Story* 335-36 (J. Hohenberg, ed. 1959). Subsequent Pulitzer Prizes were awarded for reporting on an FBI report in the Harry Dexter White case "before it was laid before the Senate by J. Edgar Hoover," and for the publication of the Pentagon Papers. *Id.* at 346; *The Pulitzer Prize Story II* 351 (J. Hohenberg, ed. 1980).

Nation's rejection of what they term a productive use—an editorial—in favor of what they mistakenly term an non-productive use—a news story. (Pet. Br. at 37-38) How are the courts to evaluate which use is more productive? Are editorials more "productive" because they criticize rather than summarize?

In deciding copyright cases, courts historically have refrained from making the very determinations that Harper & Row would import into the law. In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903), Justice Holmes eschewed such quintessentially subjective judgments when he refused to exclude circus posters from copyrightable subject matter. Dismissing the defendant's argument that such posters were not sufficiently "connected with the fine arts," the Court stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Id. at 251-52. *Accord Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 304, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *MCA, Inc.* v. *Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting) ("[w]e cannot, under the guise of deciding a copyright issue, act as a board of censors outlawing X-rated performances"); *Pillsbury*

Co. v. *Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) (court would not consider pornographic nature of parody in determining fair use).

Indeed, in proposing a particularized case by case, article by article inquiry into public benefit, Harper & Row would plunge this Court into the very quagmire of deciding what is and is not newsworthy, what is and is not news reporting, that was rejected in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974):

> And [the extension of the *New York Times* test proposed by *Rosenbloom*] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." . . . We doubt the wisdom of committing this task to the conscience of judges.

Id. at 346 (citation omitted). *Cf. Regan* v. *Time, Inc.*, 104 S. Ct. 3262, 3293 (1984) (Stevens, J., concurring in part, dissenting in part) (stating that the law barring reproduction of currency for specified purposes should be construed to mean that when the "image is used in connection with a news article" it is protected "unless the editor's use of the image bears no rational relationship to the information or idea he is trying to convey"); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 581-82 (1977) (Powell, J., dissenting) (stating that in absence of a claim that use of a film clip of a "human cannonball" as news was "a subterfuge or cover for private or commercial exploitation," its use should not be penalized).

Harper & Row similarly would have this Court inquire into the comparative contribution to the public benefit between The Nation's use and the use that *Time* planned to make. Harper & Row claim that The Nation disserved the public by publishing its article before *Time* (with its larger circulation) published excerpts from the Ford manuscript. (Pet. Br. at 29) Given Harper & Row's view of the matter, publication by *Time* of a

news article about a forthcoming book that was to be excerpted in The Nation should be treated more favorably than publication by The Nation of an article about a forthcoming book to be excerpted in *Time*. All else aside, it is a position rife with constitutional flaws. *Cf. Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Williams* v. *Rhodes*, 394 U.S. 23 (1968).

Congress has provided a far more neutral answer. Reference to "news reporting" in the statute means that the dissemination of information to people other than those who bought, reviewed, or heard the original is presumptively of public benefit. Thus, any inquiry into whether The Nation's readers are identical to *Time*'s and whether the information about Mr. Ford's definitive version of the pardon reached those who might otherwise not receive it is as unnecessary as it is unwarranted.

News reporting is a use explicitly favored by Congress. The Court of Appeals correctly found the first factor to weigh heavily in favor of fair use.[22]

B. The Nature Of The Copyrighted Work

The use that may be made of poetry differs dramatically from the use that may be made of a law book. The second fair use factor takes that difference into account. The Court of Appeals held that, because the memoirs were predominantly factual, copyright protection was narrowed. (Ct. App. Op. A-27 to A-28) That conclusion finds ample support in this Court's decision in *Sony* and in long-established law in the lower federal courts.

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22 The Court of Appeals also rejected as legally irrelevant the District Court's holding that the article was published for profit (Ct. App. Op. A-27), a rejection that Harper & Row do not appear to challenge before this Court. Of course, if The Nation's use somehow could be found unfair because the magazine is incorporated as a for profit corporation (the newsstand sales for the issue that included the article totalled $418 (R. Vol. I, TR A777)), no use of expression in a review printed in *The New York Times* or in a book published by Harper & Row could qualify as a fair use. *See Consumers Union of United States, Inc.* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3875 (U.S. May 14, 1984) (No. 83-1870).

In *Sony*, the majority noted that not "all copyrights are fungible" and went on to state that "[c]opying a news broadcast may have a stronger claim to fair use than copying a motion picture." 104 S. Ct. at 795 n.40. The dissent explicitly considered the second factor:

> The rationale guiding application of this factor is that certain types of works, typically those involving "more of diligence than of originality or inventiveness," *New York Times Co.* v. *Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (N.J. 1977), require less copyright protection than other original works. Thus, for example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.

Id. at 817 (Blackmun, J., dissenting). *Accord MCA, Inc.* v. *Wilson*, 677 F.2d 180, 182 (2d Cir. 1981); *Hoehling* v. *Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Arnstein* v. *Porter*, 154 F.2d 464, 468 (2d Cir. 1946); 3 M. Nimmer, *Nimmer on Copyright* § 13.05[A][2] at 13-73 to 13-74 (1984).

The Court of Appeals thus was correct in holding that the nature of the book favored a judgment of fair use. In discussing the information in the memoirs about the pardon, Professor Fred W. Friendly testified: "[that] had all the elements of a serious news story about one of the most cataclysmic and serious events in peace time." (JA 72) David Halberstam also "very strongly calibrate[d] and . . . authenticate[d] Mr. Navasky's judgment" that the pardon was the "crucial event" of Mr. Ford's term in office and the "central news" of the book. (JA 239-40; *see also* JA 255-56) There was no testimony to the contrary.[23]

Harper & Row now emphasize—and their supporting *amici curiae* focus exclusively on—the proposition that, because the

23 The District Court's opinion emphasized the lack of "newness" of information reported in The Nation article. (Dist. Ct. Op. B-6 to B-8) As to this as well, the testimony at trial was totally to the contrary. (*See* JA 72, 89-94, 100-02, 112-16, 121-32, 173-222, 239-68, 465-70)

book was to have been excerpted in *Time* two weeks after The Nation published its article, any claim of fair use must be rejected. (Pet. Br. at 29-34; *see generally* Brief for Volunteer Lawyers for the Arts as *Amicus Curiae*; Brief *Amicus Curiae* of the Association of American Publishers, Inc. ("AAP Br.")) As a matter of law, the language of the Copyright Act itself contradicts this position. Section 106, which sets forth the exclusive rights granted by the Act, is expressly and without exception made subject to section 107, which sets forth the fair use doctrine. Section 107 states:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting . . . , is not an infringement of copyright.

See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976); S. Rep. No. 473, 94th Cong., 1st Sess. 57 (1975) ("Thus, everything in section 106 is made subject to sections 107 through 117, and must be read in conjunction with those provisions").

There are several other reasons for rejecting the contention that Congress intended to narrow or abandon fair use in unpublished works. First, Congress knew very well how to codify such a distinction. The Act expressly incorporates the distinction between published and unpublished works in several sections. *E.g.*, 17 U.S.C. § 104 (1982) (national origin); *id.* § 108 (library photocopying); *id.* § 302(c)(2) (duration). The Act did not do so with respect to fair use. In fact, one expert who testified before Congress, Professor Barns of the University of West Virginia, urged without effect that the same distinction be made in the new Act with regard to the fair use of unpublished works:

> I would respectfully urge that the law contain a provision that no unpublished work may be photoduplicated or otherwise reproduced without the consent of the author or his heirs.

Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831, and 6835 Before Subcomm. No. 3 of House Comm. on

Judiciary, 89th Cong., 1st Sess. 1888 (1965) (emphasis omitted).

Second, if Congress' specification of "news reporting" as a favored use in section 107 is to have meaning, it cannot be interpreted as being limited to reporting on books already published. Such an interpretation of news certainly should not be adopted without some support from the legislative history, if not from the statutory language itself.[24]

Lacking such support, Harper & Row and the *amici* rely instead on the section of the Senate Report discussing classroom use of photocopies, *viz.*, that the unavailability of a work weighs in favor of fair use unless that unavailability is the deliberate choice of the author, and urge that fair use of an unpublished work be allowed only in "extraordinary circumstances." (Pet. Br. at 33; *see* AAP Br. at 8) S. Rep. No. 473, *supra*, at 64.[25] That Report, however, is far from persuasive

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24 Basing its submission upon a newspaper article, Harper & Row suggest that, because a book written by New York Governor Mario Cuomo was not offered to book clubs for fear of "leaks," it may be inferred that publishers have been "deterred by the majority holding from licensing prepublication excerpts." (Pet. Br. at 29) The newspaper article in question makes no reference to this case at all. In fact, the briefest glance at newspapers and magazines currently on sale reveals that pre-publication excerpts continue to be routinely sold and published. Moreover, if such extra-judicial materials are to be considered, it is surely more relevant that newspapers have frequently printed news articles about forthcoming books on political affairs prior to their publication. *See The New York Times*, March 27, 1976, p. 9, col. 1 (news article about Woodward and Bernstein book, *The Final Days*, relating to resignation of President Nixon, notwithstanding forthcoming serialization); *The New York Times*, Sept. 23, 1976, p. 36, col. 1 (news story about revelations about President Ford in "unpublished memoir" of John Dean entitled *Blind Ambition*); *The New York Times*, Sept. 29, 1976, p. 1, col. 2 (news story about forthcoming autobiography of President Nixon based on "164 pages of completed manuscript" that was "closely guarded"); *The New York Times*, Dec. 10, 1981, p. A18, col. 1 (news story based on "uncorrected proofs" of forthcoming memoirs of John Ehrlichman).

25 The two prior House Reports contained the language that now appears in the Senate Report. H.R. Rep. No. 2237, 89th Cong., 2d Sess. 61 (1966); H.R. Rep. No. 83, 90th Cong., 1st Sess. 32-33 (1967). The deletion of the language appears to have been engendered by a

authority. The section quoted by Harper & Row was omitted from the House Report, which notes its inclusion in the earlier Senate Report and states: "[t]he Committee has reviewed this discussion and considers that it still has value as an analysis of various aspects of the problem," a reference that can be understood only as referring to the "problem" of fair use and photocopying. H.R. Rep. No. 1476, *supra*, at 67. Although the Conference Report does not mention unpublished works, it did adopt the guidelines for classroom copying (which do not discuss unpublished works) that replaced the Senate discussion in the House Report. H.R. Rep. No. 1733, 94th Cong., 2d Sess. 70 (1976).

The unacceptability of Harper & Row's proffered standard of "extraordinary" circumstances before any pre-publication use may be considered fair is further demonstrated by considering the application of that analysis to television and theatre performances, which, under the Act, do not constitute publication. 17 U.S.C. § 101 (1982). Such an analysis either requires that no such use be permitted or requires a finding that the use

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1975 Supplemental Report of the Register of Copyrights noting that the fair use commentary appearing in the Senate Report was virtually the same as discussions that had appeared as much as ten years earlier in House Reports. The Register urged "that the commentary be carefully reviewed and, where necessary, revised to take account of some of the criticisms leveled at particular statements or omissions." Draft, Second Supplemental Report of Register of Copyrights on the General Revision of the U.S. Copyright Law, Subcomm. on Courts, Civil Liberties, and the Administration of Justice of House Comm. on Judiciary, 94th Cong., 1st Sess. 27 (1975). This language is especially significant because the original report of the Register contained the statement that unpublished works were immune from fair use, Report of the Register of Copyrights, *supra*, at 40, a statement relied upon by *amici*. (AAP Br. at 14) This statement was criticized, however, at hearings before the House Committee, *e.g.*, *Staff of House Comm. on Judiciary, Discussion and Comments on the Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 88th Cong., 1st Sess. 27 (Comm. Print 1963) ("I think the doctrine of fair use flatly applies to common law works") (remarks of H. Olsson), as well as before the Senate, *Copyright Law Revision: Hearings on S. 597 Before Subcomm. on Patents, Trademarks, and Copyrights of Senate Comm. on Judiciary*, 90th Cong., 1st Sess. 641-42, 645 (1967) ("we would see no reason why the general criteria set forth in Section 107 should not apply to unpublished as well as published materials") (statements of the American Historical Association).

of excerpts in a review of a play or television broadcast constitutes an "extraordinary" circumstance. The first result is insupportable under the law; the second shows the artificiality of a doctrine that requires "extraordinary" circumstances before any claim of fair use may be sustained. Notably, neither the majority nor the dissent in *Sony* adverted to the unpublished nature of the works in their analysis of whether home videotaping of in large part unpublished television broadcasts was a fair use. In sum, there is hardly, as Harper & Row claim, a "clear" legislative intent to narrow, let alone eliminate, fair use in unpublished works.[26]

Nor is Harper & Row's citation to cases and commentators for the principle that unpublished works were not subject to fair use at common law any more persuasive. (Pet. Br. at 30-31) The occasional statement of that principle by some commentators is not the basis for a holding in any case decided in this country. *See* 3 Nimmer, *Nimmer on Copyright* § 13.05 at 13-54 n.2 (1984). Indeed, the only case directly on point is flatly to the contrary. *Estate of Hemingway* v. *Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. N.Y. Co.), *aff'd*, 25 App. Div. 2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

There are additional reasons of policy militating against Harper & Row's effort to preclude courts from considering the

26 In three cases decided under the 1976 Act, the courts applied a fair use analysis to an unpublished work. (*See* AAP Br. at 9, 12) In *Diamond* v. *Am-Law Publishing Corp.*, 1984 CCH Copyright Law Dec. ¶ 25,627 (S.D.N.Y.), *appeal argued*, No. 84-7136 (2d Cir. June 18, 1984), the court held that a newspaper's unauthorized publication of an unpublished letter to the editor was a fair use. In *Aitken, Hazen, Hoffman, Miller, P.C.* v. *Empire Construction Co.*, 542 F. Supp. 252, 260 (D. Neb. 1982), the court did not find the defendant's use of plaintiff's architectural plans a fair use, *inter alia* because the use served "[n]o educational, scientific, or historical purposes"; the court, however, did not mention the unpublished nature of the work. Similarly, although the court in *Association of American Medical Colleges* v. *Mikaelian*, 571 F. Supp. 144 (E.D. Pa. 1983), rejected fair use, the court in no way relied upon the unpublished nature of the pirated Medical College Aptitude Test questions.

factors set forth by Congress with respect to fair use in pre-publication situations. Under the rule proposed by Harper & Row, newly discovered correspondence between Winston Churchill and Franklin Roosevelt could be reported on only at the whim of their heirs. Indeed, by applying Harper & Row's rule to all unpublished works, except those involving "extraordinary" circumstances, Harper & Row would treat totally dissimilar situations identically.

The reasons that led courts to speak broadly about first publication are absent here.[27] The book was not intimate poetry kept in a locked drawer, nor personal diaries. This case, in short, does not involve a right of nonpublication.[28] Nor does it involve any effort to preserve personal privacy. The book came into being as a summary of a former president's term in office and was specifically intended for public discussion. As David Halberstam testified:

> [T]he fact is that this is a presidential document, this is Gerald Ford's own witness, his final summing up, not when he is before a committee or he is still an active officer with the limits that that places upon him, but that this is his summing up, it's a presidential document, it is a state paper. It makes it news.

(JA 251-52) There is no reason why traditional fair use analysis should not be applied to such a document. Once applied, there is no basis for differing with the Court of Appeals that the nature of the work is factual and political and thus is especially conducive to a finding of fair use.

27 There was no evidence that the material on which The Nation reported differed from that in the published book. A comparison of the corresponding sections of the published book (*e.g.*, R. Vol. III, PTX 3 E12-17, E21-23, E24-25, E25-26) with the unpublished manuscript (PTX 1a E474-87) demonstrates that virtually no changes were made.

28 The desire to keep personal writings private was included by Justice Brandeis and Mr. Warren as a privacy, not a property, right in their seminal article, L. Brandeis & S. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193, 200-13 (1890).

C. The Amount And Substantiality Of The Portions Used

The amount of copyrighted material that may be used without ranging beyond the boundaries of fair use varies widely from case to case. *Compare Sony Corp. of America* v. *Universal City Studios, Inc.*, 104 S. Ct. 774 (1984) (verbatim copying of entire movies and television programs held to be fair) *and Williams & Wilkins Co.* v. *United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by an equally divided Court*, 420 U.S. 376 (1975) (systematic photocopying of entire copyrighted articles held a fair use) *with Henry Holt & Co. ex rel. Felderman* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938) (use of three sentences from a book in an advertising pamphlet held not a fair use). An important factor in assessing the substantiality of the amount used is the purpose of the use: "in any given case this question cannot be answered without a consideration of the purpose for which the defendant's work will be used." 3 M. Nimmer, *Nimmer on Copyright* § 13.03[A][2] at 13-35 (1984) (footnote omitted).

The Court of Appeals correctly rejected the District Court's negative evaluation of the third fair use factor based on the District Court's perception that The Nation article had used "the heart of the book." (Ct. App. Op. A-28; *see* Dist. Ct. Op. B-8) Concluding that the "heart" referred to was the facts about former President Ford's pardon of Mr. Nixon—precisely what Harper & Row cannot protect under the copyright laws—the Court of Appeals held that the quotations from the Ford book were "informative and . . . neither superfluous or excessive for the article's purpose." (Ct. App. Op. A-29)

As the undisputed testimony demonstrated, the use by The Nation of approximately 300 copyrightable words in a 2,250-word article about a 200,000-word book was no more than was appropriate for reporting significant news. The bulk of The Nation article was comprised of expression far different from that of the manuscript. Quotations were used only to reproduce conversations between President Ford and other public officials when the precise manner in which President Ford

expressed himself was as newsworthy as what he had to say, *e.g.*, his explanation of his reasons for pardoning Mr. Nixon.[29]

Contrary to Harper & Row's contention (Pet. Br. at 32-33, 37), the proper legal standard is whether the amount used was appropriate to the purpose—here, reporting on the book. *See Italian Book Corp.* v. *American Broadcasting Cos.*, 458 F. Supp. 65, 68 (S.D.N.Y. 1978) ("ABC's recording of portions of the [copyrighted song], and its subsequent playing on the television news program, constituted an integral part of a news report on an event of public interest"); *cf. Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 569 (1977) (commenting that a report on Zacchini's performance with descriptions, comments and perhaps including his picture would be "a very different case").

If The Nation had written an editorial, Harper & Row argue, The Nation would have used very little expression; therefore, the article as written took too much. (Pet. Br. at 37) Harper & Row might as well urge that if The Nation had chosen an entirely different topic to report on, it would have used no quotations from the Ford book at all. The law is to the contrary; the third fair use factor relates to the amount and substantiality of material used for the purpose the user chose, not the purpose the party suing would have preferred.

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29 Mr. Halberstam and Professor Friendly agreed—and there was no dispute in the record—that the amount of expression used was necessary for and appropriate to the purposes of the article. Mr. Halberstam testified:

> It seems to me Mr. Navasky did quite an honorable and responsible job of seeking for news and held down to an uncommon degree the direct quotations. I think to the degree he could he centered on news and he paraphrased. There is only one four, five or six line thing where he really directly quotes. I think it's on how Mr. Ford thinks Mr. Nixon looks, which is almost impossible to paraphrase.

(JA 265; *see* JA 116-17)

D. The Economic Impact Of The Article On The Market For The Copyrighted Work

The District Court concluded that the fourth factor weighed against a finding of fair use because Harper & Row's agreement with *Time* was aborted. (Dist. Ct. Op. B-8) But, as the Court of Appeals determined, by failing to take into account that the article consisted almost wholly of uncopyrightable facts and material in the public domain, the District Court essentially granted copyright protection by fiat where none existed by law.

What both *Time* and Harper & Row wished to guard was the exclusive right to the information in the manuscript. That conclusion is confirmed by Harper & Row's contract with President Ford—requiring Mr. Ford to refrain from disclosing information (JA 484)—as well as by Harper & Row's contract with *Time*—requiring renegotiation if the news leaked out.[30] (R. Vol. IV, PTX 9 E565)

That both The Nation and *Time* viewed the information in the book about the pardon as particularly newsworthy is hardly surprising. It shows, rather, consistent judgment—borne out by common sense—that readers would be interested in the facts about the central political event of the 1970s. But that is precisely what is not subject to copyright protection. The Court of Appeals was plainly correct in holding that any injury that may have been caused by The Nation's use of the news—of facts—is an injury for which Harper & Row may not be compensated by the copyright laws.

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30 That conclusion is also confirmed by reading the article itself. (Ct. App. Op. A-31 to A-38)

III

THE COURT OF APPEALS CORRECTLY TOOK ACCOUNT OF FIRST AMENDMENT PRINCIPLES

Two of the three questions that Harper & Row claim are raised by this case relate to the First Amendment. The first is whether the First Amendment requires that copyright protection for non-fiction works be narrowed; the second is whether the First Amendment should "prevail over copyright" when the copyright owner is soon to publish his or her work. (Pet. Br. at *i*)

Neither of these issues is presented by this case. The Court of Appeals said nothing at all about the First Amendment "prevailing" over the copyright laws; nor did it rule that non-fiction works must always receive less protection under the Copyright Act because of the First Amendment.

Without question, the Court of Appeals concluded that there was need to strike "a definitional balance" between the First Amendment and copyright by permitting the free communication of facts while still protecting an author's expression. (Ct. App. Op. A-18) Without doubt, the court emphasized that an interpretation of the Copyright Act that permitted information to be copyrighted "would clash with the First Amendment on every occasion in which an author chose to put in his own words facts which had already been described by another writer." (Ct. App. Op. A-18 to A-19) Nor can there be any quarrel that the Court of Appeals' ruling recognized the risks of a strained and expansive definition of "expression" in the context of works of "news and history" (Ct. App. Op. A-19) and was generally informed by the need to accommodate First Amendment interests without ignoring long-standing principles of copyright law.

In so ruling, the Court of Appeals acted in conformity with well-established law. Not only are the idea-expression dichotomy and the fair use doctrine consistent with First Amendment principles: they accommodate those principles by

assuring that the copyright laws will not be interpreted in a fashion inconsistent with the First Amendment itself. *See Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577 n.13 (1977) (emphasizing the absence of any restraint on an idea or concept); *Dallas Cowboys Cheerleaders* v. *Pussycat Cinema, Ltd.*, 604 F.2d 200, 206 (2d Cir. 1979) ("[t]he fair use doctrine allows adjustments of conflicts between the first amendment and the copyright laws"); *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) ("the idea-expression dichotomy . . . serves to accommodate the competing interests of copyright and the First Amendment"); *cf. Keep Thomson Governor Committee* v. *Citizens for Gallen Committee*, 457 F. Supp. 957 (D.N.H. 1978).

Given the scope of the protections built into the copyright laws to accommodate First Amendment interests, it remains an open question whether there is a need for First Amendment protection beyond that afforded by the Copyright Act itself. *See Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1178, 1184 (5th Cir. 1980) (Brown, J., concurring in part and Tate, J., concurring). What cannot be questioned, however, is that the crabbed approach to principles of freedom of expression reflected in Harper & Row's submission would, if adopted, pose a grave, if utterly unnecessary, conflict between the First Amendment and the Copyright Act. The copyright clause of the Constitution is, as this Court has observed, "permissive" not mandatory with respect to the protection of copyright interests. *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U.S. 518, 530 (1972). The Constitution does not require the adoption of any copyright law; it surely does not require a copyright law that would override First Amendment rights.[31]

31 The views of James Madison, the draftsman of the copyright clause, and of Thomas Jefferson are telling. Madison, who supported the adoption of a written Bill of Rights on the ground that "the political truths declared in that solemn manner [will] acquire by degrees the character of fundamental maxims of Free Government," 3 *Roots of the Bill of Rights* 614-18 (B. Schwartz, ed. 1980), believed that copyright and patent protection was "too valuable to be wholly renounced" but nonetheless dangerous enough so that the public should retain the right "to abolish the privilege at a price to be specified in the grant of it." *Id.* at 615. Jefferson believed that a Bill of Rights explicitly protecting freedom of the press was something "no just government should refuse, or resist on influence." *Id.* at 607. By contrast, the notion of granting the "exclusive rights to the profits" flowing from ideas "as an encouragement to men to pursue ideas" was, Jefferson observed, something that "may or may not be done according to the will and convenience of the society, without claim or complaint from anybody." *The Jefferson Cyclopedia* 433 (J.P. Foley, ed. 1967).

Harper & Row's view of the Copyright Act would threaten core First Amendment principles. Permitting uncopyrightable fact to be transformed into a copyrightable "totality" by placing it in close proximity to expression would, as the Court of Appeals observed, empower public officials "to take private possession of the most important details of a nation's historical and political life. . . ." (Ct. App. Op. A-21) Treating as a "commercial"—and hence presumptively infringing—user any publication that is sold to the public would imperil every publication that prints news. Barring any use, however slight, of expression before its author chooses to sell it would continually interfere with the public's ability to be informed.

First Amendment rulings of this Court have been far more responsive to claims of freedom of expression. Cases such as *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), and *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979), establish that the publication of truthful information about matters of public importance is entitled to First Amendment protection even though the state has a legitimate interest in not having the information published. In those cases, this Court made clear that once information reaches the press, the press is free to publish that information notwithstanding a strong public interest in secrecy. As Chief Justice Burger summarized the law, "the government cannot restrain communication of whatever information the media acquire—and which they elect to reveal." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 10 (1978) (plurality opinion).

Other cases, as well, illustrate the constitutional price Harper & Row's view of the Copyright Act would exact. In cases such as *Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966), and *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (*per curiam*), this Court emphasized the unique role in our society of political discussion and debate about candidates for public office. The Nation article rests securely within this core of First Amendment values. "By far the greatest part of the article," as the Court of Appeals observed, "was no more than the reporting of information concerning political decisions at the highest level of government." (Ct. App. Op. A-29) In fact, the article related, almost in its entirety, to individuals still under consideration for the highest positions in the nation. It is difficult to envision material more protected by the First Amendment.

There are other First Amendment costs that the adoption of Harper & Row's view of copyright would inflict. Prior restraints are, for example, routinely available in copyright cases. *See L.A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U.S. 100, 102 (1919); *New York Times Co.* v. *United States*, 403 U.S. 713, 731 n.1 (1971) (White, J., concurring). But even to contemplate the issuance of an injunction against publication of a news article about President Ford's reasons for pardoning President Nixon is to recall this Court's conclusion in a different context that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976). We do not suggest that the disfavor with which prior restraints are viewed should lead to the conclusion that no news reporting may be enjoined, however slavishly it copies another's work. What it does suggest is that there is need for sensitivity in balancing the claims of the law of copyright and those of the First Amendment. The opinion of the Court of Appeals displayed just such sensitivity.

The facts of this case are not in dispute. Harper & Row paid President Ford to write a book that included "unpublished materials" about his pardon of Mr. Nixon and about other newsworthy events that occurred during his presidency. They

caused Mr. Ford not to answer questions about the pardon. They sold the book to the public on the basis of its news "revelations." In such circumstances, no application of First Amendment principles should permit them now to interpret the Copyright Act to impose liability on The Nation for revealing information about the pardon and other matters of state or for quoting what the Court of Appeals rightly characterized as "a meager, indeed an infinitesimal amount of Ford's original language." (Ct. App. Op. A-32)

Fortunately, the Copyright Act neither requires nor permits such a result. In taking care to apply the Copyright Act in a manner consistent with First Amendment principles, the Court of Appeals acted in full accord with both the Copyright Act and the First Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

vs.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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THE PARTIES

The Parties before this Court are those set forth in the caption.*

* Pursuant to Rule 28.1 of the Rules of the Supreme Court: Petitioner Harper & Row, Publishers, Inc. states that it has no corporate parent and that other than Fitzhenry & Whiteside Ltd., a Canadian corporation, it has no subsidiaries or affiliates (other than wholly-owned subsidiaries). Petitioner The Reader's Digest Association, Inc. states that it has no corporate parent and no publicly owned subsidiaries or affiliates.

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ARGUMENT

I

The *Nation* Has Not Attempted To Defend the Novel Legal Standards Applied by The Majority In the Court Below in Determining Copyrightability

(1) Limiting Expression to its Barest Elements

The *Nation*'s brief discusses at length the distinction between fact and expression, but does not attempt to defend the standard which the majority applied in making that distinction - limiting expression to its "barest elements - the ordering and choice of the words themselves." (A-19). The holding is not even mentioned in the *Nation's* brief.

The majority's narrow definition of expression cannot be explained away as *dicta*, as Gannett tries to do in its *amicus* brief. (Gannett Br. at 17-18 n.27). Limiting expression to its "barest elements" is one of the legal principles relied on by the majority to deny copyright protection to much of the material copied by the *Nation*. Moreover, the majority applied this standard in the face of the correct articulation of the law by the dissent:

> ...while a second author may feel free to use facts that are in the first work, he cannot appropriate expression, method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original.

(A-42).

The *Nation* apparently contends that the majority gave adequate recognition to elements of authorship beyond the "ordering and choice of the words themselves" because the majority recognized as protectible, an author's "overall arrangement of facts," the "structure he chooses for the work as a whole" and the unique and protected mosaic of "the total entity". (*Nation* Br. at 18). But this recognition was limited to the work as a whole. It had nothing to do with this case, because Petitioners

never contended that the *Nation*'s copying infringed the mosaic of the "total entity." The recognition did not extend to the portions of the manuscript copied by the *Nation*.

The *Nation*'s reliance on statements by the majority that the *Nation* took only "disparate facts" and "scattered pieces of information" is also misplaced. (*Nation* Br. at 18-19). These characterizations simply reflect the erroneous legal standards applied by the majority. They in no way fit the facts of this case. President Ford's story of the pardon, which makes up the bulk of the *Nation* article, is not just "disparate facts" and "scattered pieces of information." It is a coherent story, as told by President Ford, and repeated by the *Nation*, including President Ford's own expression of the various factors considered by him in granting the pardon and the steps taken and difficulties encountered in carrying out the decision. (E 6-29).

The *Nation*'s own testimony reinforces the conclusion that the *Nation* did not merely take "scattered pieces of information." Mr. Navasky urged throughout the trial that President Ford's version of the discussions with Haig had a different emphasis than the Hungate version (Navasky, TR, JA 348-350, 375-83, 452-53) and that the main thing in the new version was "the configuration of information, rather than this or that." (Navasky, Dep., R. Vol.IV, E 924-25). Mr. Halberstam's testimony, emphasizing the importance of the material as President Ford's "final summing up" after leaving office, also contradicts the *Nation*'s presentation of the material as "disparate facts." (JA 251-252).

The District Court's conclusion that the *Nation* took President Ford's expression is also fully supported by Mr. Navasky's trial testimony that that indeed is what he sought to and did do. (Main Br. at 10).

(2) Denying Copyrightability to Expression Incorporating Facts

Neither the *Nation* nor the *amici* discuss the decisions which reject a dissection approach to determining copyrightability. (Main Brief at 19-21). Yet it is just such an approach which the *Nation* urged in its "sentence-by-sentence" analysis (JA 557-625), and which the majority adopted.

Nor do the opposition briefs cite any authority rejecting the District Court's approach of looking at the copied material as a whole in determining copyrightability. The *Nation* and Gannett argue only that following this approach will give an author a monopoly over facts *per se*. (*Nation* Br. at 22; Gannett Br. at 12-13). The opinion by the District Court, however, cannot be so read.

First, the District Court recognized the validity of the very principle that the *Nation* and Gannett claim is violated. The District Court stated:

> Without question, defendants are correct in their assertion that the historical facts and the memoranda prepared by others are not *per se* copyrightable by President Ford.

(B 10).

Furthermore, the District Court's factual findings make clear that its decision will not extend protection to facts *per se*.

> ...these facts and memoranda were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation.
>
> * * *
>
> ...Suffice it to say that, simply viewed, I regard the historical facts, memoranda and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence.[1]

(B 10-11).

(3) Allowing Virtually Unlimited Paraphrasing From a Work of Non-Fiction

The *Nation* and the *amici* also fail to defend the majority's erroneous belief that the cases which equate paraphrasing with copying concerned instances in which "an alleged infringer borrowed virtually an entire work." (A 17). Yet this is the governing legal principle which the majority cited in rejecting any consideration of the *Nation*'s paraphrasing. The cases cited in our main brief (at 21-22) demonstrate that the majority's standard is unprecedented and incorrect.[2]

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[1] The *Nation* disputes our assertion that these are "findings" which are "unchallenged." (*Nation* Br. at 22 n. 16). That they are "findings" is apparent from the language itself. That they are unchallenged is clear from the *Nation's* Second Circuit brief, which stated, "...the case involved few disputed factual issues *and none relevant to this appeal.*" (Brief of Defendants-Appellants-Cross-Appellees, at 2 n. 3) (emphasis supplied).

[2] In attempting to distinguish these cases, Gannett, like the *Nation*, misstates their findings. The court in *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928) did not rest its decision on a finding that the defendant had used virtually all of plaintiff's selection of facts (Gannett Br. at 20-21 n. 33), but rather found that the defendant's outright copying and paraphrasing in the 54 instances specifically alleged by the plaintiff was sufficient to conclude the question of infringement in the plaintiff's favor. *Id.* at 87-88. Nor is there any basis for Gannett's assertion that the court in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), was influenced by the fact that the defendant presented the three sentences which it copied from the plaintiff's work as a direct quote. To the contrary, the court held that "[t]he reproduction need not be literal and exact; it is a piracy if it appears the copyrighted work has been copied, although altered or paraphrased." 23 F. Supp. at 304 (citations omitted). Similarly, in *Wagner v. Meccano, Ltd.*, 234 F. 912 (S.D. Ohio 1916), *aff'd*, 246 F. 603 (6th Cir.

The *Nation* is incorrect when it states that paraphrasing has never been sufficient for infringement in a case such as this. (*Nation* Br. at 20). In *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Cal. 1963), the court found infringement in defendant's magazine article, which was in large part a paraphrase of portions of the plaintiff's book, the court stating: "...to constitute an infringement of copyright, the infringing composition need not be identical with the infringed; paraphrasing is an infringement." (*Id.* at 924).

The *Nation* also errs when it argues that "paraphrase" means "use of fact." (*Nation* Br. at 19). An examination of Appendix E to the Petition for Certiorari demonstrates that in numerous instances the *Nation*'s paraphrasing involved taking the identical words or phrasing used by President Ford.

Applying the traditional rule on paraphrasing will not, as the *Nation* contends, preclude reporting on President Ford's discussion of his decision to pardon Nixon (*Nation* Br. at 20). It will only ensure that any such "reporting" that takes substantial copyrighted material will be judged by the standards of fair use.[3]

Footnote Continued

1917) the court did not base its finding of infringement on the "virtually verbatim taking of material, contiguous portions of plaintiff's pictorial and oral expression." (Gannett Br. at 21). Rather, it found that the defendant had infringed the plaintiff's instruction manual for its mechanical toys by "...paraphrasing the language of some of [plaintiff's] statements and descriptions in its Manuals so as to describe the same thing in somewhat different language." 234 F. at 922. Gannett's reliance on *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F. 2d 485 (9th Cir. 1984) is likewise misplaced, because that case did not involve "close paraphrasing" or copying of plaintiff's "selection, coordination and arrangement" of the material. *Id.* at 488-489. Further the instructional material involved in *Landsberg*, unlike the material here, was capable of only a "narrow range of expression". *Id.* at 488.

[3] Gannett's argument that statements attributed to others are not copyrightable by Ford (Gannett Br. at 16 n. 25) is directly inconsistent with Nimmer's treatise, where he argues that the statements in question must have been reconstructions, and as such were copyrightable. (1 M. Nimmer, *Nimmer on Copyright*, § 2.11[B] at 2-161 n.11 (1984)). "[A] very slight degree of original contribution to form will suffice, as where an 'author' reconstructs an actual conversation rather than using a verbatim stenogrphic report." *Id.* at 2-160.

II

The *Nation* Has Not Acknowledged That The Right They Are Seeking to Vindicate Is the Right to Scoop an Author on the Author's Own Copyrighted Material

The *Nation* has not attempted to demonstrate how the policy of facilitating the dissemination of information applies to this case, where the author himself was about to disseminate the material. Nor has the *Nation* sought to show any benefit to the public from its unauthorized release of the material only days ahead of its lawful release by the author.

The *Nation* has not acknowledged that what it did here - to use its own words - was "to scoop President Ford on his own memoirs," (R. Vol.IV, PTX 22, E 782) and that that is the "right" the *Nation* seeks to vindicate.

By ignoring what actually happened, the *Nation* and Gannett cite principles that have no application here. Thus the *Nation* (at 32) relies on a statement in *Hoehling v. Universal City Studios*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) that knowledge is expanded "by granting new authors of historical works a relatively free hand to build upon the work of their predecessors", and Gannett cites the classic statement by Professor Chaffee that a "dwarf standing on the shoulders of a giant can see farther than the giant himself." (Gannett Br. at 10). But this policy has no application when the second "author" is really engaged in a race to publish first, and, far from building upon, in fact has added nothing at all to the first author's work.

The *Nation* characterizes petitioners as "book publishers who sell news [and] would prefer to be the first to do so." (*Nation* Br. at 28). Rather, petitioners are asserting a right derived from the author, and expressly recognized in the Copyright Act, to be the first publisher of the author's copyrighted material.

The characterization is not apt for a second reason. President Ford testified that while in office he had disclosed all of

the facts about the pardon and that in the book he expressed in addition, "my subjective feelings, my personal discussions with my wife and others" and "the more intimate, the more personal, the more subjective personal feelings that went through my mind from the time that the pardon became a possibility." (JA 492-97; Finding 23, C 16-17). Petitioners also understood that the material not previously disseminated would relate to Ford's descriptions of his personal thoughts and feelings about the events of his Presidency, rather than the events themselves. (Finding 24, C 17).

The *Nation*'s criticism of President Ford for failure to disseminate, prior to first publication, copyrighted material it took him two years to write overlooks the fact that it was the very process of writing the book that brought forth these insights. The *Nation* quotes Ford's deposition testimony concerning a statement in the manuscript, concededly expression (JA 609), that "Had I said otherwise at that moment the whole house of cards might have collapsed." (*Nation* Br. at 4). Ending its quotation with the testimony that this observation was not published prior to book publication, the *Nation* omits the following questions and answers:

Examination By Mr. Abrams:

* * *

Q Would it have been useful, do you think, for individuals passing judgment on your performance as president to have had the information that you provided in your book with respect to the pardon?

A You mean from the date of the pardon up until the time the book was written?

Q Yes, sir.

A I think it was important to them to have what I wrote in the book, based on my thoughtful preparation in the book, yes.

Q Would it have been important for them to have had it earlier.

A Not necessarily my subjective feelings, no. They had on the record the factual presentation, but the subjective feelings I had in the period of time I think could best be made available for history by the writing of the book.

(JA 524, 531-32).

The portions omitted by the *Nation* emphasize the important role that authorship plays in facilitating the dissemination of material to the public, a role which the majority and the *Nation* virtually ignore.

III

Congress Clearly Intended That The Fair Use Defense Would Be Narrowed When the Work Was Unpublished

In passing the Copyright Act of 1976, Congress clearly intended that the fair use defense would be narrowed when the work was unpublished. To avoid this obvious and dispositive conclusion, the *Nation* and Gannett are forced to distort the legislative history.

Both the *Nation* and Gannett place great reliance on the fact that the language of the 1975 Senate Report - that the applicability of the fair use doctrice to unpublished works is narrowly limited - was not repeated in the 1976 House Report. (*Nation* Br. at 34-35; Gannett Br. at 25). Indeed Gannett argues that the failure to repeat the language implies a contrary intent on the part of the House. (Gannett Br. at 25 n. 46).

In fact, however, the House did not reject this concept, but actually *endorsed* it. On two prior occasions, 1966 and 1967, the House had included in its report on the Copyright Act, the very langugage contained in the Senate's 1975 report. (H.R. Rep. No. 2237, 89th Cong., 2d Sess. 63 (1966); H.R. Rep. No. 83, 90th Cong., 1st Sess. 34 (1967)). Between the issuance of the 1975

Senate Report and the 1976 House Report, the interested parties (authors, publishers and educators) met and agreed on a set of guidelines for classroom copying. Those guidelines were incorporated in the 1976 House report and approved. (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 67-72 (1976)). It was for this reason that the earlier discussion was not included. Nonetheless the House went out of its way to endorse that earlier discussion, stating:

> In 1967 the Committee also sought to approach this problem by including, in its report a very thorough discussion of "the considerations lying behind the four criteria listed in the amended section 107, in the context of typical classroom situations arising today." This discussion appeared on pp. 32-35 of the 1967 report, and with some change has been retained in the Senate Report on S. 22 (S. Rep. No. 94-473, pp. 63-65). *The Committee has reviewed this discussion, and considers that it still has value as an analysis of various aspects of the problem.*

(*Id.* at 67) (emphasis supplied).

The Committee was clearly referring to its discussion of the use of unpublished manuscripts, since that was one of the aspects of the problem which the prior report had thoroughly analyzed. Moreover, as the 1976 House Report observed, the standards discussed in the report were not limited to classroom teaching, but were applicable to all kinds of uses:

> The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

(*Id.* at 72).

Since the House in fact approved the prior discussion, the *Nation*'s speculation as to the reasons for rejecting it are wide of the mark. (*Nation* Br. at 34-35 n. 25). They are also distorted. For example, the quote from the American Historical Association ("we would see no reason why the general criteria set forth in Section 107 should not apply to unpublished as well as published materials") (*Id.* at 35 n. 25) omits the introductory phrase "in this area." In fact the Association was addressing written "memorabilia whose authors are no longer alive." Moreover, the Association specifically refrained from criticizing the idea that fair use should have narrow application to unpublished works "intended for publication." *Copyright Law Revision: Hearings on S. 597 Before Subcomm. on Patents, Trademarks and Copyrights of Senate Comm. on Judiciary*, 90th Cong., 1st Sess. 641-42, 645 (1967).

Similarly the quote from Mr. Olsson ("I think the doctrine of fair use flatly applies to common law works") (*Nation* Br. at 34 n. 25), in colloquy occurring in 1963, omits the fact that the colloquy concerned works such as plays that were disseminated to the public, but technically unpublished, and omits Mr. Olsson's subsequent assertion that he was not referring to a case where material had been given to another in confidence.* In any event the House adopted the language recognizing the narrow application of fair use to unpublished works in 1966, after the statement of Mr. Olsson.

The Committee report itself disproves Gannett's contention that fair use is narrowed only in a case where the plaintiff has made the deliberate choice that the work is unpublished and *is to remain unpublished* . (Gannett Br. at 25-26). After referring to the author's deliberate choice, the report goes on to state that under ordinary circumstances, an author's "right of first publication" would prevail. Obviously the report would not have referred to the "author's right of first publication" had it intended the

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*Here the District Court found that "Plaintiffs undertook to keep the manuscript confidential" and that "Plaintiff Harper & Row's subsidiary rights department required all those to whom the manuscript was shown to sign an agreement to keep the manuscript confidential." (Finding 30, C 19-20).

limitation suggested by Gannett.[5]

The *Nation* argues the plain language of the statute overrides the clear statement of legislative intent and that adverse inferences should be drawn from Congress' failure to make a specific distinction between published and unpublished works in the fair use provision.[6] But Congress decreed that the fair use doctrine calls for "a sensitive balancing of interests." *Sony Corp. of America v. Universal City Studios, Inc.*, 104 S. Ct. 774, 795 n.40, *reh'g denied*, 104 S. Ct. 1619 (1984). Any such balancing requires the conclusion that there is a vast difference between using material already published and taking material from a manuscript not yet published, particularly when the manuscript is received from a source who has breached a promise to keep it confidential. As we have demonstated (Main Br. at 26-29), the policy of

[5] Gannett makes a similar error when it asserts that the quotation from the English case of *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769) refers to the concept of total confidentiality and lack of intent to publish. (Gannett Br. at 26 n. 49). The very next sentence from the opinion of Mr. Justice Yates disproves the contention: "And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority is guilty of a manifest wrong..." (4 Burr. at 2379).

[6] The *Nation*'s reliance on a written submission by William Barns, Associate Professor of History of the University of West Virginia, is misplaced. (*Nation* Br. at 33-34). Professor Barns' proposal related to his concern to provide "effective protection of unpublished theses and dissertations" because some librarians might interpret the fair use provision "as authority for illegal reproduction of manuscripts in their possession." *Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831 and 6835 before Subcomm. No. 3 of House Comm. on Judiciary*, 89th Cong., 1st Sess. 1887 (1965). The fair use provision then in the bill simply stated that fair use was not an infringement. (H.R. Rep. No. 2237, 89th Cong., 2d Sess. 58-66 (1966)). Subsequent to the Barns submission, Congress specifically addressed the problem of library photocopying (17 U.S.C. Section 108 (1982)) and incorporated in its Committee reports the language on which we rely making clear that the applicability of the fair use doctrine to unpublished works is narrowly limited.

disseminating information is not advanced, but is in fact positively disserved by allowing unauthorized copying from a manuscript about to be published. Furthermore use of material from an unpublished manuscript has a much greater potential for harm to the copyright owner than does the use of material from an already published book. As the court noted in the recent case, *Belushi v. Woodward*, 10 Media L.Rep. (BNA) 1870 (D.D.C. 1984), the successful marketing of a book depends upon "the coordination of advertising, serialization, author appearances, and reviews, and the release to the public of the book." *Id.* at 1871. (*See also Goodis v. United Artists Television, Inc.*, 425 F2d 397, 403 (2d Cir. 1970)). The *Nation*'s publication interfered directly with that coordination by disrupting the publishers' plans for serialization. Thus the sensitive balancing of interests mandated by Congress would call for rejection of the fair use defense in this case, even if Congress had not made clear its intent in the committee reports we have cited.

The *Nation* argues that because Congress cited news reporting as a permissible fair use purpose, it could not have intended to limit the use of unpublished manuscripts. (*Nation* Br. at 34). But Congress also specified "teaching" as a permissible fair use purpose and at the same time made clear its intent that this did not include, except in extraordinary circumstances, the right to use an unpublished manuscript.

The *Nation* and Gannett also distort the common law rule relating to the use of unpublished manuscripts. Gannett argues that *Stanley v. Columbia Broadcasting System, Inc.* 35 Cal.2d 652, 661, 221 P.2d 73, 77-78 (Cal. 1950) (en banc) is not relevant because it was decided at a time when California operated under a statute which was more restrictive than common law or statutory copyright. (Gannett Br. at 24 n. 42). But the language of the Supreme Court of California, including its reference to the common law and its reliance on *Corpus Juris*, makes clear that its statements are not based upon some specially restrictive provisions of California law. The court stated:

> Speaking generally ...common-law rights in unpublished works are of a wider and more exclusive nature than the rights conferred by statutory copyright in published works. The common law prohibits any kind of unauthorized interference with, or use of an unpublished work on the ground of an exclusive property right * * * while a statutory copyright permits a "fair use" of the copyright publication, without deeming it an infringement. * * * 18 C.J.S., Copyright and Literary Property, § 2, page 138, et seq.; and cases there cited.[7]

(*Id.* at 77-78).

In addition, both the *Nation* and Gannett incorrectly cite *Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd* 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd on other grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968) as a holding allowing fair use of unpublished works. (*Nation* Br. at 36; Gannett Br. at 24 n. 43). That case's discussion of fair use occurs in a portion of the opinion dealing with items relied on by the plaintiff that had "no relevance to a claim resting on common-law rights." 279 N.Y.S.2d at 56. After describing these items, the court stated: "All of these have been generally published, in that they have been distributed to the public at large, without any of the limitations that could preserve the common law copyright." *Ibid.* The court did not mention fair use when dealing with the use of letters and oral conversations.

The authorities cited in our brief (at 30), the AAP brief (at 14-17) and the brief on behalf of Volunteer Lawyers for the Arts (at 3-6) demonstrate clearly that the common law is consistent with the intent of Congress in enacting the Copyright Act.

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[7] In his treatise, Nimmer cites *Stanley*, without qualification, for the proposition that "It has further been judicially stated that the defense of 'fair use' is not available in a common law copyright action." 2 M. Nimmer, *Nimmer on Copyright*, § 8.23 at 8-273 (1984).

IV

Giving Weight to the Non-Productive Nature of the *Nation*'s Use Will Not Require the Court to Evaluate the Worth of the *Nation* Article

The *Nation* distorts Petitioner's argument that the non-productive nature of the use should have been considered by the courts below in this case. As the *Nation* presents it, our view would require a case-by-case determination of the worth of the article. (*Nation* Br. at 28-31). But we are contending only that the *Nation*'s failure to add *anything* to the material it took is a factor to be weighed in the balancing. In such a case, the copier is merely seeking to publish the first author's material for its own sake. Prohibiting such copying does not deprive the public of the copier's speech, because the copier has added nothing to the first author's material. Furthermore, the risk of harm to the copyright owner is greater in the case of a non-productive use, because of the greater likelihood that the use will be a substitute for the author's work or an authorized adaptation of the author's work. That has long been held to be an important factor weighing against a claim of fair use. *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4, 901).

Gannett recognizes that the productive use requirement calls for "the contribution of original elements of authorship by the person asserting the fair use of defense." (Gannett Br. at 23). Gannett argues that this use should be considered productive because of the "legitimate paraphrasing" and "selection and arrangement" of materials taken from the manuscript. (Gannett Br. at 23). No doubt some authorship is involved in this. But since Congress has given authors the exclusive right to condense their own works (17 U.S.C. Sections 106(2), 101 (definition of "derivative work") (1982)), it would be a perversion of the statutory purpose to allow an unauthorized condensation to be considered a productive use for fair use purposes.[8]

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[8] With respect to the fourth fair use factor, there is simply no evidence in the record to support the argument that *Time* cancelled the contract with

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The *Nation*'s Expert Testimony, and the "Time Honored Practices of the Media" Relied on by Gannett, Do Not Establish a Fair Use Defense

The "time honored practices of the media" which Gannett relies on for a fair use defense (Gannett Br. at 2-3) are not supported by the record. Gannett argues that news organizations do not customarily add "independent commentary" and that once material is authenticated, it will be published "as soon as possible." (Gannett Br. at 3-4).

Professor Friendly, however, testified that comparing the manuscript with the known record was "the big part of the job of a working journalist" (JA 82). Nor did Professor Friendly confirm the necessity to publish immediately.

> ...it is my job to get the information out as best I can, as reliably as I can, with whatever insight and organized curiosity I may have. *I could not let [Time's publication] be a factor.*

Footnote continued

Harper & Row because of the *Nation*'s publication of facts (*Nation* Br. at 40; Gannett Br. at 29). To the contrary, the managing editor of *Time* magazine testified that *Time* was interested in Chapters I and III of the manuscript, the chapters from which the *Nation* copied, because they were the "most interesting and moving parts of the entire manuscript." (Cave, Dep., R. Vol. V, E 1048-49). Gannett also misstates the record when it argues that *Time* initially sought "simply" to move forward the date of its serialization (Gannett Br. at 29). When *Time* learned of the *Nation* article, it advised Harper & Row that there were two orders of business. One related to moving forward the date of serialization. The second "was whether any further payments should be made at all on the contract..." (Glikes, TR, R. Vol. I, A 232-233). Gannett further distorts the record when it cites Harper & Row's refusal to advance serialization, without also citing Harper & Row's belief that advancing serialization would adversely affect the marketing of the book, and the fact that the District Court accepted this testimony. (B 24-26 n. 11).

> Q Would you try to get it out as fast as you could consistent with your publishing or broadcasting schedule?
>
> A Depends what you mean by fast. I would not be reckless. *My criterion would be:* Is it a fair reflection of the book, *is it accurate and have I done as much digging with the known record*, et cetera. *You would not try to get it out in 24 hours, I would not try to beat the competition.* Somebody told me that—I would always assume that if I had it, maybe some other people had it. That wouldn't really enter into my mind, especially if I was publishing a magazine like The Nation. That would not be a factor. *I train myself to get it right, to get it straight, and then publish it.*

(JA 119-20) (emphasis added).

Similarly the record offers no support for Gannett's attempt to treat this case as just one of "innumerable news stories...based on unsolicited documents and information" (Gannett Br. at 4). The *Nation* had made a similar contention in its trial memorandum (JA 329) but its own Mr. Navasky failed to back it up. He testified that it was a rare event to receive a manuscript without the permission of the author or publisher (Navasky, TR, JA 323), and he expressly denied the contention now being made to this Court:

> Q ...Is it your testimony that the manner in which the Ford manuscript arrived, or as you put it, was dropped into your lap, came to you in a fashion indistinguishable from that of most news which arrives unsolicited at a magazine or newspaper?
>
> A No.

(JA 330).

The *Nation* also distorts the testimony of its own experts. It ignores the testimony of Professor Friendly cited above that comparing the manuscript with the known record is "the big part

of the job of a working journalist." It quotes only a portion of Mr. Halberstam's testimony concerning the extent of copying (*Nation* Br. at 39 n. 29), but ignores the testimony that fits precisely the facts of this case.

> I would think that if the New York Times wrote a story based on [a portion of Halberstam's *The Best and the Brightest]*, that they would have the right to quote from up to three or 400 words directly from my manuscript, yes. It may be as they began to go above that they would be beginning to infringe upon my book. But again it's a gray area...If they had run 600 words of my portrait of Robert McNamara, with the anecdotes and the writing that was mine, then I would have really felt raped and I would be angry...

(JA 273).

At bottom, the *Nation*'s view is that the resolution of the issues raised by this case should be the sole province of journalists, for the *Nation* condemns any critical inquiry into a claim of "news reporting" and any weighing of that interest against other interests, even though those other interests are secured, not only by federal statute, but by the Constitution itself. (U.S. Constitution Art. I, Section 8, cl. 8). But, as Professor Friendly correctly acknowledged, the question of fair use is one to be decided by the Court. (Friendly, TR, JA 111). The testimony by Richard Reeves, another of the *Nation*'s experts, illustrates vividly why that should be so:

> THE WITNESS: ...I know that I never heard the word copyright discussed in a newsroom. I mean, we, the people who sit and put together papers, don't spend time talking about things like that.
>
> • • •
>
> THE COURT: ...Let's suppose you come into possession of a manuscript of a book of his that is about to be published....

> • • •
>
> ...Are you saying that if you found something newsworthy in that book you would publish, irrespective of the copyright?
>
> THE WITNESS: I would publish first, and think about it later....
>
> • • •
>
> THE COURT: ...[Y]ou are aware that that probably is a copyrighted document or to be copyrighted prior to publication and therefore there are copyright features about it that do exist. You certainly have that awareness.
>
> THE WITNESS: I'm sure that is true, and I have that awareness at this moment. I have never taken that into account in any judgment that I have made.

(JA 167-71).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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